Impeachment: An Overview of Constitutional Provisions, Procedure, and Practice

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Summary

For the first time since the judicial impeachments of 1986-1989, the House of Representatives has impeached two federal judges. On June 19, 2009, the House voted to impeach U.S. District Judge Samuel B. Kent of the U.S. District Court for the Southern District of Texas. The impeachment trial of Judge Kent before the Senate was dismissed after Judge Kent resigned from office and the House indicated that it did not wish to pursue the matter further.

The impeachment inquiry with respect to U.S. District Court Judge G. Thomas Porteous, Jr., from the Eastern District of Louisiana was initiated in the 110th Congress and continued in the 111th Congress. H.Res. 1031, a resolution impeaching Judge Porteous for high crimes and misdemeanors, was introduced on January 21, 2010. On March 11, 2010, the House impeached Judge Porteous. In four unanimous votes, the House approved each of four articles of impeachment, then agreed to the impeachment resolution by a voice vote. On March 17, 2010, the House Managers presented these articles of impeachment before the bar of the Senate. Pursuant to S.Res. 457, the Senate issued a summons to Judge Porteous to respond to the articles of impeachment. Under S.Res. 458, the Senate created an Impeachment Trial Committee to take and report evidence in the case. After completing its work, the committee submitted a certified record of its proceedings to the Senate and filed its report summarizing the articles of impeachment and the evidence received. On December 7, 2010, the full Senate heard arguments on pending motions and on the merits of the case, then went into closed door deliberations on the motions and the articles of impeachment. On December 8, 2010, the Senate, sitting as a Court of Impeachment, voted to convict Judge Porteous on all four of the articles of impeachment brought against him. A judgment of removal from office flowed automatically from his conviction. In a rare additional judgment, the Senate disqualified him from holding federal office in the future.

The impeachment process provides a mechanism for removal of the President, Vice President, and other federal civil officers found to have engaged in "treason, bribery, or other high crimes and misdemeanors." The Constitution places the responsibility and authority to determine whether to impeach and to draft articles of impeachment in the hands of the House of Representatives. Should the House vote to impeach and vote articles of impeachment specifying the grounds upon which impeachment is based, the matter is then presented to the Senate for trial. Under the Constitution, the Senate has the sole power to try an impeachment. The decision whether to convict on each of the articles must be made separately. A conviction must be supported by a two-thirds majority of the Senators present. A conviction on any one of the articles of impeachment brought against an individual is sufficient to constitute conviction in the trial of the impeachment. Should a conviction occur, the Senate must determine what the appropriate judgment is in the case. The Constitution limits the judgment to either removal from office or removal and prohibition against holding any future offices of "honor, Trust or Profit under the United States." Under the precedents in the Senate since 1936, removal from office flows automatically from conviction on an article of impeachment. However, a separate vote is necessary should the Senate deem it appropriate to disqualify the individual convicted from holding future federal offices of public trust. Such a vote requires a simple majority. Conviction on impeachment does not foreclose the possibility of criminal prosecution arising out of the same factual situation. The Constitution does not permit the President to extend executive clemency to anyone in order to preclude his or her impeachment by the House or trial or conviction by the Senate. The President has no power to grant reprieves and pardons for offenses against the United States in cases of impeachment.

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Introduction

The American impeachment process places in the legislative branch the authority to remove the President, Vice President, and other federal civil officers in the executive and judicial branches upon a determination that such officers have engaged in treason, bribery, or other high crimes and misdemeanors. It is one of the checks and balances grounded in the American constitutional structure. This report summarizes impeachment proceedings in the 111th Congress, examines relevant constitutional provisions, and provides a brief historical overview.

Summary of Impeachment Proceedings in the 111th Congress

On March 4, 2010, H.Res. 1031, a resolution "impeaching G. Thomas Porteous, Jr., judge of the United States District Court for the Eastern District of Louisiana, for high crimes and misdemeanors" and setting forth four articles of impeachment,[1] was reported by the House

[1] The four articles of impeachment allege:

—In Article I, that Judge Porteous, while a federal judge, engaged in a pattern of conduct incompatible with the trust and confidence placed in him in that position by denying a motion to recuse himself in a case where he had a corrupt financial relationship with the law firm representing one of the parties, and, in contravention of the canons of judicial ethics, failed to disclose that he had engaged in a corrupt scheme with two lawyers in that firm beginning while he was a state court judge in the late 1980s. Further, he is alleged to have made misleading statements in the recusal hearing that deprived the U.S. Court of Appeals for the Fifth Circuit of critical information for its review of a petition for writ of mandamus seeking to overrule Judge Porteous's denial of recusal, thereby depriving the parties and the public of the right to the honest services of his office. In addition, he is alleged to have solicited and accepted things of value from those attorneys while the case was pending before him, and, without disclosing this, ruled in favor of those attorneys' client. By virtue of this corrupt relationship and his conduct as a federal judge, Judge Porteous is alleged to have brought his court into scandal and disrepute, prejudiced public respect for, and confidence in, the federal judiciary, and demonstrated that he is unfit for the office of federal judge. For this conduct, Article I declares that Judge Porteous is guilty of high crimes and misdemeanors and should be removed from office.

—In Article II, that Judge Porteous, both as a state court judge and as a federal judge, engaged in a longstanding pattern of corrupt conduct that demonstrates his unfitness to serve as a U.S. district court judge, by engaging in a corrupt relationship with a bail bondsman and his sister, soliciting and accepting numerous things of value from them while taking official actions that benefitted them and using the power and prestige of his office to assist their business. In addition, Article II alleges that Judge Porteous knew that the bail bondsman made false statements to the FBI in an effort to assist the judge in being appointed to the federal bench. Article II declares that thereby Judge Porteous has engaged in conduct so utterly lacking in honesty and integrity that he is guilty of high crimes and misdemeanors, is unfit to hold the office of Federal judge, and should be removed from office.

—In Article III, that Judge Porteous, between March 2001 and July 2004, while a federal judge, engaged in a pattern of conduct inconsistent with the trust and confidence placed in him as a Federal judge by knowingly and intentionally making material false statements and representations under penalty of perjury related to his personal bankruptcy filing and by repeatedly violating a court order in his bankruptcy case, thereby bringing his court into scandal and disrepute, prejudicing public respect for and confidence in the federal judiciary, and demonstrating that he is unfit for the office of federal judge. For this conduct, Article III declares that Judge Porteous is guilty of high crimes and misdemeanors and should be removed from office.

—In Article IV, that, in 1994 in connection with his nomination to be a U.S. district court judge, Judge Porteous knowingly made material false statements about his past to both the United States Senate and to the FBI in order to obtain that office. These false statements were alleged to have been made in his supplemental SF-86, in his FBI background check, and in his "Questionnaire for Judicial Nominees." Article IV alleges further that Judge Porteous's failure to disclose the corrupt relationships with the law firm and the bail bondsman described in the first two articles or to disclose his knowledge that such bail bondsman had given false statements to the FBI in an effort to assist the judge (continued...)

Judiciary Committee, H.Rept. 111-427, and placed on the House Calendar, Calendar No. 170. On March 11, 2010, after one hour of debate, the House voted to impeach Judge Porteous. In four separate unanimous votes, the House agreed to each of the articles of impeachment.[2] Then the impeachment resolution was passed by a voice vote. The Members appointed as House Managers for the Porteous impeachment trial appeared before the Senate to present the impeachment resolution, including the articles of impeachment brought against the judge, on March 17, 2010. The Senate, organized as a Court of Impeachment, then issued a summons to Judge Porteous requiring him to answer the articles brought against him by April 7, 2010, and appointed an Impeachment Trial Committee of 12 Senators to take evidence in the case.

The impeachment investigation of Judge Porteous began during the 110th Congress. On June 17, 2008, pursuant to 28 U.S.C. §355(b)(I), the Judicial Conference of the United States certified to the House of Representatives its determination that consideration of impeachment of Judge Porteous may be warranted.[3] On September 17, 2008, the House of Representatives adopted H.Res. 1448 (110th Congress) directing the House Judiciary Committee to inquire whether the House should impeach him.[4] A Task Force on Judicial Impeachment was established by the House Judiciary Committee to pursue this investigation. The Porteous impeachment investigation was not completed during the 110th Congress. Because the House of Representatives is not a continuing body, in order for the House Judiciary Committee to continue its impeachment investigation in the 111th Congress, the House had to take action to renew the House Judiciary Committee's authority. On January 13, 2009, the House passed H.Res. 15, giving the House Judiciary Committee authority to continue this investigation in the 111th Congress.[5] The Task Force on Judicial Impeachment, reestablished by the House Judiciary Committee on January 22, 2009, continued its investigation of Judge Porteous's conduct.

(...continued)

in being appointed to the federal bench deprived the United States Senate and the public of information that would have had a material impact on his confirmation. By virtue of this, Article IV declares that Judge Porteous is guilty of high crimes and misdemeanors and should be removed from office.

[2] Article I was agreed to by a vote of 412-0 (Roll no. 102), 156 *Cong. Rec*. H1327-H1328 (daily ed. March 11, 2010). Article II was agreed to by a vote of 410-0 (Roll no. 103), 156 *Cong. Rec*. H1328, H1335-H1336 (daily ed. March 11, 2010). Article III was agreed to by a vote of 416-0 (Roll no. 104), 156 *Cong. Rec*. H1328, H1335-H1336 (daily ed. March 11, 2010). Article IV was agreed to by a vote of 423-0 (Roll No. 105), 156 *Cong. Rec*. H1328, H1336-H1337 (daily ed. March 11, 2010).

[3] The Order and Public Reprimand issued by the Judicial Council for the Fifth Circuit concerning Judge G. Thomas Porteous on September 10, 2008 may be found at http://www.ca5.uscourts.gov/news/news/GTP%20ORDER%20AND%20PUBLIC%20REPRIMAND.pdf.

[4] 154 *Cong. Rec*. H8354 (daily ed. September 17, 2008). The text of the resolution may be found at 154 *Cong. Rec*. H 8354 (daily ed. September 17, 2008).

[5] The 110th Congress adjourned before the Porteous impeachment investigation could be completed. Unlike the Senate, the House of Representatives is not a continuing body. Therefore the investigative authority of the House Judiciary Committee under H.Res. 1448 (110th Congress) expired at the end of the 110th Congress. On January 13, 2009, the House passed H.Res. 15, giving the House Judiciary Committee authority to continue its inquiry into Judge Porteous's conduct in the new Congress. 155 *Cong. Rec*. H179-82 (daily ed. January 13, 2009). On January 22, 2009, the House Judiciary Full Committee adopted a resolution to reestablish the Task Force on Judicial Impeachment first established September 17, 2008, to investigate the allegations regarding Judge Porteous. TRANSCRIPT OF MEETING ON APPROVAL OF COMMITTEE RULES, RATIFICATION OF SUBCOMMITTEE CHAIRMANSHIPS AND MEMBERSHIP, AND RE-ESTABLISHMENT OF THE TASK FORCE ON JUDICIAL IMPEACHMENT, THURSDAY, JANUARY 22, 2009, HOUSE OF REPRESENTATIVES, COMMITTEE ON THE JUDICIARY, WASHINGTON, D.C. at 30-34, found at http://www.judiciary.house.gov/hearings/transcripts/transcript090122.pdf. On September 30, 2009, Representative Conyers introduced H.Res. 785, to authorize the House Committee on the Judiciary to inspect and receive certain tax returns and tax return information for the purposes of its investigation into whether Judge Porteous should be impeached. This resolution was referred to the House Rules Committee. No action was taken on it.

On January 21, 2010, House Judiciary Committee Chairman John Conyers, Jr., on behalf of himself, Ranking Member Lamar Smith, and all of the Members of the House Judiciary Committee's Task Force on Judicial Impeachment, introduced H.Res. 1031. The measure was referred the House Judiciary Committee the same day. On March 4, 2010, the resolution was reported by the committee and placed on the House Calendar.[6] On March 11, 2010, the House voted to impeach Judge Porteous, and approved four articles of impeachment by four unanimous votes. The House then approved H.Res. 1165, appointing Representative Schiff, Representative Zoe Lofgren of California, Representative Johnson of Georgia, Representative Goodlatte, and Representative Sensenbrenner to be Managers on the part of the House to conduct the impeachment trial on its behalf in the Senate.[7] In addition, H.Res. 1165 provided "that a message be sent to the Senate to inform the Senate of these appointments, and that the managers on the part of the House may exhibit the articles of impeachment to the Senate and take all other actions necessary in connection with preparation for, and conduct of, the trial." On March 17, 2010, the House Managers appeared before the bar of the Senate to present the impeachment resolution and exhibit the articles of impeachment against Judge Porteous.[8]

After organizing as a Court of Impeachment,[9] the Senate agreed to two resolutions. S.Res. 457 directed the Sergeant at Arms to serve upon Judge Porteous a summons requiring him to answer the articles against him by April 7, 2010.[10] The judge's answer was filed on that date.[11] Under this resolution, the House Managers had until April 21, 2010, to respond to Judge Porteous's answer with their replication. Their replication was filed with the Senate on April 15, 2010.[12] In a letter filed in the Senate on April 21, 2010, and served upon Judge Porteous's counsel the same day, the House Managers made four corrections to the replication.[13] Pursuant to Rule XI of the "Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials," the second resolution, S.Res. 458, created an Impeachment Trial Committee to receive and report evidence in the

[6] The Task Force on Judicial Impeachment approved the resolution by a vote of 8-0 on January 21, 2010. The full committee approved the resolution on January 27, 2010, by a vote of 24-0.

[7] H.Res. 1165 was considered by unanimous consent and agreed to by the House. 156 *Cong. Rec*. H1340 (daily ed. March 11, 2010).

[8] 156 *Cong. Rec*. S1644-S1646 (daily ed. March 17, 2010).

[9] U.S. CONST. art. I, sec. 3, cl. 6, requires that the Senators be on oath or affirmation when sitting on an impeachment trial. The Presiding Officer and all of the other Senators present when the Senate organized itself as a Court of Impeachment on March 17, 2010, took the oath, "Do you solemnly swear that in all things appertaining to the trial of the impeachment of G. Thomas Porteous Jr., Judge of the United States District Court for the Eastern District of Louisiana, now pending, you will do impartial justice according to the Constitution and laws, so help you God?" Any Senators not present at the time must take the oath before taking part in the impeachment proceedings in the Senate.

[10] *Id*. at S1646-S1647 (daily ed. March 17, 2010). For the return of service of the summons by the Deputy Sergeant at Arms of the Senate, see 156 *Cong. Rec*. S2181 (daily ed. April 12, 2010).

[11] In re: Impeachment of G. Thomas Porteous, Jr., United States District Judge for the Eastern District of Louisiana, Answer of Judge G. Thomas Porteous, Jr., to the Articles of Impeachment, filed in the Senate of the United States Sitting for the Trial of an Impeachment on April 7, 2010, 156 *Cong. Rec*. S2182-S2184 (daily ed. April 12, 2010).

[12] In re: Impeachment of G. Thomas Porteous, Jr., United States District Judge for the Eastern District of Louisiana, Replication of the House Managers to the Answer of G. Thomas Porteous, Jr., to the Articles of Impeachment, filed in the Senate of the United States Sitting for the Trial of an Impeachment on April 15, 2010, 156 *Cong. Rec*. S2358-S2360 (daily ed. April 15, 2010).

[13] On April 21, 2010, the House Special Impeachment Counsel, on behalf of the House Managers, filed a letter in the Senate regarding errata in the replication, 156 *Cong. Rec*. S2529-S2530 (daily ed. April 21, 2010). The letter set out four corrections to the replication filed on April 15, 2010, and requested that, in any future publications of the replication, these corrections would be incorporated. The amended replication is printed at 156 *Cong. Rec*. S2601-S2603 (daily ed. April 22, 2010).

impeachment trial of Judge Porteous.[14] Upon the recommendations of the majority leader and the minority leader, the presiding officer appointed Senators McCaskill, Klobuchar, Whitehouse, Udall of New Mexico, Shaheen, Kaufman, Hatch, Barrasso, DeMint, Johanns, Risch, and Wicker to be members of this committee.[15] Senator McCaskill will serve as chairman of the committee, while Senator Hatch will serve as vice chairman.

The Senate Impeachment Trial Committee held its organizational meeting on April 13, 2010.[16] Pursuant to the rules that govern impeachment trials before the Senate, the Impeachment Trial Committee, after completing its work, submitted a certified record of its proceedings to the Senate and filed its report summarizing the articles of impeachment and the evidence received.[17] In making its determinations in an impeachment trial, the full Senate may rely upon the evidence collected by a Senate Impeachment Trial Committee or may gather further evidence. In this case, the Senate relied upon the Impeachment Trial Committee's evidence and report. In addition, the Senate reviewed the post-trial filings of the House of Representatives and Judge Porteous. The determination whether to convict or acquit on any article rests with the full Senate, as does the determination, upon conviction, of the judgment to be imposed. The Constitution limits a judgment upon conviction in an impeachment trial to removal or removal and disqualification from holding further federal offices.

On December 7, 2010, the full Senate heard oral arguments from the parties on pending motions and on the merits of the case. At the conclusion of final arguments presented by the House Managers and Judge Porteous, the Senate cleared the Senate Chamber and went into closed door deliberations on the motions and the articles of impeachment brought against Judge Porteous. On December 8, 2010, the Senate voted to convict Judge Porteous on each of the four articles of impeachment.[18] The vote to convict on article I was unanimous, by a vote of 96 to 0.[19] He was

[14] 156 *Cong. Rec*. S1647 (daily ed. March 17, 2010).

[15] *Id.*

[16] The webcasts of the organizational meeting of the Senate Impeachment Trial Committee and of the hearings held by this committee on the articles of impeachment against Judge G. Thomas Porteous, Jr., on August 4, 2010, and September 13, 14, 15, 16, and 21, 2010, may be found on the website of the Senate Impeachment Trial Committee, at http://www.sitc.senate.gov.

[17] *Report of the Impeachment Trial Committee on the Articles of Impeachment Against Judge G. Thomas Porteous, Jr.*, S.Rept. 111-347, 111th Congress, 2d Sess. (filed November 15, 2010; ordered printed November 16, 2010). This report, the post trial briefs of the parties, and links to the transcripts of the hearings held by the Senate Impeachment Trial Committee on the articles of impeachment against Judge G. Thomas Porteous, Jr., are available on the website of the Senate Impeachment Trial Committee, which may be found at http://www.sitc.senate.gov. The hearings may be found in Volumes 1-3 of *Impeachment Trial Committee on the Articles of Impeachment against Judge G. Thomas Porteous, Jr.: Hearings before the Senate Impeachment Trial Committee on the Articles of Impeachment against Judge G. Thomas Porteous, Jr., a Judge in the United States District Court for the Eastern District of Louisiana*, 111th Cong., 2d Sess. (2010).

[18] Before voting upon the articles of impeachment brought against Judge Porteous, the full Senate voted upon a motion by Judge Porteous to disaggregate the allegations in the articles, which could have led to independent votes on each allegation in individual articles rather than votes on each article of impeachment in their entirety. The motion was rejected by a vote of 0 yeas and 94 nays (Record Vote Number 260), 156 *Cong. Rec*. S8608 (December 8, 2010).

[19] 156 *Cong. Rec*. S8608-S8609 (December 8, 2010) (Record Vote Number 261). This is the second impeachment in the history of federal impeachments in which a vote to convict a person on an article of impeachment in a Senate trial was unanimous. In 1862, seven articles of impeachment were brought against Judge West Humphreys. Votes were taken on articles I through V and VII in their entirety. Three specifications under article VI were voted upon separately. Judge West Humphreys was convicted on articles I through V and VII, and also found guilty of two of the three specifications under Article VI in his impeachment trial. The votes for conviction on articles I and V were unanimous, 39 to 0. 3 HINDS' § 2396, at 818.

convicted on article II by a vote of 69 to 27.[20] On article III, Judge Porteous was convicted by a vote of 88 to 8.[21] The vote to convict on article IV was 90 to 6.[22] By virtue of having been convicted on these articles, Judge Porteous was removed from office. In rare additional judgment, the Senate, by a vote of 94 to 2, voted to disqualify Judge Porteous from holding any future federal office.[23]

The impeachment investigation with respect to Judge Porteous is one of two impeachment inquiries regarding federal judges undertaken in the 111th Congress.[24] On June 14, 2009, the House of Representatives impeached Judge Samuel B. Kent of the U.S. District Court for the Southern District of Texas.[25] On June 19, 2009, the House adopted H.Res. 520 (111th Congress), impeaching Judge Kent and setting forth four articles of impeachment.[26] Five days later, the

[20] 156 *Cong. Rec*. S8609 (daily ed. December 8, 2010) (Record Vote Number 262).

[21] 156 *Cong. Rec*. S8609-S8610 (daily ed. December 8, 2010) (Record Vote Number 263).

[22] 156 *Cong. Rec*. S8610 (daily ed. December 8, 2010) (Record Vote Number 264).

[23] 156 *Cong. Rec*. S8611 (daily ed. December 8, 2010) (Record Vote Number 265). The Senate has voted to disqualify a person convicted in an impeachment trial on two previous occasions, involving Judge West Humphreys in 1862, III HINDS' § 2397, and Judge Robert Archbald in 1913, VI CANNON'S § 512, respectively.

[24] In the intervening years between the impeachment trials of 1986, 1988, and 1989 and the impeachment proceedings in the current Congress, three U.S. district court judges were the focus of impeachment resolutions before Judge Kent and Judge Porteous. During the 103rd Congress in 1993, three resolutions impeaching Robert F. Collins, U.S. District Judge for the Eastern District of Louisiana, H.Res. 174, H.Res. 176, and H.Res. 207, were introduced in the House of Representatives and referred to the House Judiciary Committee. Judge Collins had been convicted of bribery in 1991 and sentenced to 82 months in prison followed by two years of supervised release. Judge Collins resigned from office after exhaustion of his appeals from the criminal proceedings, and after the Judicial Conference of the United States, on June 23, 1993, advised the House "that U.S. District Judge Robert F. Collins of the Eastern District of Louisiana has engaged in conduct which might constitute grounds for impeachment, pursuant to [then] 28 U.S.C. 372(c)(8)(A)." 139 *Cong. Rec*. H4017 (daily ed. June 24, 1993), 1993 WL 220824. No further action was taken on the impeachment resolutions. In 1993, H.Res. 177 was introduced impeaching Robert P. Aguilar, U.S. District Judge for the Northern District of California. This measure was also referred to the House Judiciary Committee. Judge Aguilar was indicted in 1989. His first trial resulted in an acquittal on one count of obstruction of justice, but no verdict was reached on other charges. In his second trial, he was convicted on one count of endeavoring to obstruct justice and one count of unlawful disclosure of a wiretap, and was sentenced to 6 months in prison, 1,000 hours of community service, and a $2,000 fine. On appeal, the conviction on both counts was reversed. He resigned from office after seven years of trials, retrials, and appeals. No further action was taken on H.Res. 177. During the 109th Congress in 2006, H.Res. 916 was introduced, impeaching Manuel L. Real, U.S. District Judge for the Central District of California. The matter was referred to the House Judiciary Committee, and then to the Subcommittee on Courts, the Internet, and Intellectual Property. Subcommittee hearings were held on September 21, 2006. No further action was taken on the resolution.

[25] Judge Kent pled guilty to obstruction of justice on February 23, 2009. Transcript of Plea Hearing, United States v. Kent, No. H-08-CR-596 (U.S. District Court, S.D. Tex., Houston Div. February 23, 2009), at 17-18, *cited at* H.Rept. 111-159 at 10 (June 17, 2009) (There appears to be some variation in the way in which the case number in this case is cited, both among court documents and as cited by the House Judiciary Committee; *compare* "H-08-CR-596" used on the transcript of the plea hearing *with* "Crim. No. 4:08CR0596-RV" used by the House Judiciary Committee in H.Rept. 111-159 *and with* "Case # 4:08cr596-001/RV" used by U.S. District Court for the Southern District of Texas, Houston Division, in its "Judgment in a Criminal Case" cited below setting out the terms of the sentence imposed. In this report, we have used the citation form with respect to each document that the document itself employed.) Judge Kent was sentenced to 33 months in prison followed by three years of supervised release, a $1,000 fine, and $6,550 in restitution. United States v. Kent, No. 4:08cr596-001/RV, at 2, 6 (S.D. Tex. May 11, 2009) (Judgment in a Criminal Case). *See* H.Rept. 111-159, at 13. Following his conviction, the Judicial Council of the U.S. Court of Appeals for the Fifth Circuit recommended impeachment pursuant to 28 U.S.C. 354(b)(2)(A). The Judicial Council's recommendation may be accessed at http://www.ca5.uscourts.gov/news/news/SBK%20Certification.pdf.

[26] 155 *Cong. Rec*. H7066-7067 (daily ed. June 19, 2009). H.Res. 520 includes four articles of impeachment, which were agreed to by unanimous consent in separate votes. The articles allege that Judge Kent sexually assaulted two court employees and that he subsequently made false statements regarding the incidents to the Federal Bureau of Investigation and to an investigatory committee of the U.S. Court of Appeals for the Fifth Circuit. In a second resolution adopted the same day, H.Res. 565 (111th Congress), the House appointed and authorized House Managers to (continued...)

House Managers presented H.Res. 520 to the Senate,[27] sitting as a court of impeachment. Then the Senate, acting in that capacity, pursuant to S.Res. 202, issued a summons to Judge Kent directing him to respond to the articles of impeachment against him by July 2, 2009. The same day, pursuant to S.Res. 203, the Senate appointed a committee of 12 Senators to receive and report evidence with respect to these articles of impeachment under Rule XI of the Senate Rules When Sitting on an Impeachment Trial.[28] When served with the summons, Judge Kent tendered a letter of resignation from the federal bench to take effect on June 30, 2009.[29] On June 29, 2009, counsel to the President accepted Judge Kent's resignation on behalf of President Obama.[30] On July 20, 2009, the House agreed to H.Res. 661, instructing the House Managers to appear before the Senate, sitting as a court of impeachment, and "advise the Senate that, because Samuel B. Kent is no longer a civil officer of the United States, the House of Representatives does not desire further to urge the articles of impeachment hitherto filed in the Senate against Samuel B. Kent." The Senate agreed to a motion to dismiss the articles of impeachment against former Judge Kent on July 22, 2009.[31]

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handle the impeachment proceedings. 155 *Cong. Rec*. H7067 (daily ed. June 19, 2009).

[27] 155 *Cong. Rec*. S6959 (daily ed. June 24, 2009). The text of the impeachment resolution and articles of impeachment may also be found here.

[28] Upon the recommendations of the Senate Majority Leader and the Senate Minority Leader, the 12 Senators appointed to be members of the committee to receive and report evidence in the impeachment of Judge Samuel B. Kent included Senators McCaskill (chairman), Klobuchar, Whitehouse, Udall of New Mexico, Shaheen, Kaufman, Martinez (vice-chairman), DeMint, Barrasso, Wicker, Johanns, and Risch. 155 *Cong. Rec*. S6961 (daily ed. June 24, 2009).

[29] He had previously tendered a letter of resignation on June 2, 2009, intended to take effect on June 1, 2010. H.Rept. 111-159, "Impeachment of Judge Samuel B. Kent," Committee on the Judiciary of the U.S. House of Representatives, 111th Cong., 1st Sess., at 14 (June 17, 2009). Prior to his resignation, Judge Kent sought to retire from the bench on disability. *Cf*., 28 U.S.C. §§ 371-372. Disability retirement would have permitted him to continue to receive a salary for the remainder of his life, absent subsequent resignation or removal from office through the impeachment process. *Cf*., 28 U.S.C. § 371; U.S. CONST. art. III, sec. 1, cl. 2 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."). His request for disability retirement was rejected by the Chief Judge of the U.S. Court of Appeals for the Fifth Circuit on May 27, 2009. *See* http://www.ca5.uscourts.gov/News/news/DeguerinResponseLetter.pdf. Unlike retirement, resignation from the federal bench results in termination of a former federal judge's judicial salary. For more information on federal judicial salaries, see CRS Report RL34281, *Judicial Salary: Current Issues and Options for Congress*, by Denis Steven Rutkus.

[30] *See* 155 *Cong. Rec*. S7833 (daily ed. July 22, 2009) (remarks of Senator Reid).

[31] 155 *Cong. Rec*. S7833 (daily ed. July 22, 2009). The House Managers appeared before the Senate sitting as a Court of Impeachment on July 22, 2009, presented H.Res. 661, and respectfully requested that the Senate discontinue the impeachment proceedings against former Judge Kent. Senator Reid moved to dismiss the impeachment proceedings, stating:

> Mr. President, as the Sergeant at Arms advised the Senate prior to the July 4 recess, following the service of the summons on Judge Kent by the Sergeant at Arms on June 24, 2009, Judge Kent tendered his resignation as a United States District Judge, effective June 30, 2009. At the direction of the Senate, the Secretary delivered Judge Kent's original statement of resignation to the President. On June 29, 2009, counsel to the President accepted Judge Kent's resignation on behalf of the President. The House of Representatives has now moved that the Senate dismiss the Articles of Impeachment.
>
> Mr. President, I have conferred with the distinguished Republican leader, Mr. McConnell, and with the distinguished Chairman and Vice Chairman of the Impeachment Trial Committee on the Articles Against Judge Samuel B. Kent appointed by the Senate, the Senator from Missouri, Mrs. McCaskill, and the Senator from Florida, Mr. Martinez. All are in agreement that, with the resignation of Judge Kent, the purposes of the House's prosecution of the Articles of Impeachment against Judge Kent have been achieved. Judge Kent is no longer serving on the Federal bench, and he has ceased drawing his judicial salary. It is agreed that no useful purpose would now be

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Background

Authority to remove the President, Vice President, and federal civil officers by impeachment has been placed, by constitutional mandate, in the hands of the legislative branch of the United States government. Although rooted in the soil of English impeachment experience, the American impeachment system differs from its English forebear in some significant respects. Recorded incidents of English impeachments may begin as early as 1376, and one source would place the first in 1283.[32] A more fixed procedure appears to have begun in 1399, with the passage of the statute of I Henry IV, c. 14.[33] Whichever date one chooses, it is clear that the English practice took root well before the colonial beginnings of the United States. It ceased to be used in England at about the time that it became part of the American system of government. The last two impeachments in England appear to have been those of Warren Hastings in 1787 and of Lord Melville in 1805.[34] The English system permitted any person to be impeached by the House of Commons for any crime or misdemeanor, whether the alleged offender was a peer or a commoner.[35]

Unlike the British system, which permitted penal sanctions to attach upon conviction of impeachment,[36] the American system is designed to be remedial in function. Despite surface similarities to a criminal trial, the judgments which may be rendered upon conviction of an article of impeachment in the American system are limited to removal from office and disqualification from holding further offices of public trust. Thus, the American system seems more designed to protect the public interest than to punish the person impeached. Nevertheless, much of the procedure and practice involved in this country's application of its impeachment process draws guidance and support from British precedents.[37]

(...continued)

> accomplished by proceeding further with the impeachment proceedings against Judge Kent.
>
> Accordingly, I now move that the Senate order that the Articles of Impeachment against former Judge Samuel B. Kent be dismissed and that the Secretary be directed to notify the House of Representatives of this order.

[32] *See* Simpson, Jr., A., "Federal Impeachments," 64 *U. Pa. L. Rev.* 651 (1916); Yankwich, L., "Impeachment of Civil Officers Under the Federal Constitution," 26 *Geo. L.J.* 849 (1938), *reproduced in* H. COMM. ON THE JUDICIARY, 93RD CONG., 1ST SESS., IMPEACHMENT, SELECTED MATERIALS 689 (Comm. Print, October 1973), and in H. COMM. ON THE JUDICIARY, 105TH CONG., 2D SESS., IMPEACHMENT, SELECTED MATERIALS 1825 (Comm. Print, November 1998). Simpson, in his 1916 article, discussed the British history in considerable depth before moving into a discussion of some aspects of the Constitutional Convention's consideration of impeachment as envisioned in what would become the American system.

[33] Simpson, Jr., A., *Federal Impeachment*, 64 U. PA. L. REV. 651 (1916).

[34] Brief of Anthony Higgins and John M. Thurston, counsel for the respondent, Judge Charles Swayne, offered in the latter's impeachment trial on February 22, 1905, *reprinted in* III HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES § 2009, at 322 (1907).

[35] Yankwich, *supra* n. 14, at 690.

[36] Conviction under the British impeachment system could result in punishment by imprisonment, fine or even death. Berger, R., *Impeachment for 'High Crimes and Misdemeanors,'* 44 SO. CAL. L. REV. 395 (1971), *reprinted in* H. COMM. ON THE JUDICIARY, 93RD CONG., 1ST SESS., IMPEACHMENT, SELECTED MATERIALS 617 (Comm. Print October 1973), and in H. COMM. ON THE JUDICIARY, 105TH CONG., 2D SESS., IMPEACHMENT, SELECTED MATERIALS 1825 (Comm. Print November 1998).

[37] *See* JEFFERSON'S MANUAL, published in CONSTITUTION, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, ONE HUNDRED TENTH CONGRESS, H. Doc. No. 109-157, 109th Cong., 2d Sess. 314-331 (2007). This may also be found at http://www.gpoaccess.gov/hrm/browse_110.html, which, in turn, (continued...)

The Constitutional Framework

The somewhat skeletal constitutional framework for the impeachment process can be found in a number of provisions. These include the following:

> Art. I, Sec. 2, Cl. 5:
>
> The House of Representatives ... shall have the sole Power of Impeachment.
>
> Art. I, Sec. 3, Cl. 6 and 7:
>
> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two-thirds of the Members present.
>
> Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.
>
> Art. II, Sec. 2, Cl. 1:
>
> The President ... shall have Power to grant Reprieves and Pardons for offences against the United States, except in Cases of Impeachment.
>
> Art. II, Sec. 4:
>
> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.
>
> Art. III, Sec. 2, Cl. 3:
>
> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.

(...continued)

may be accessed through the website of the House Rules Committee under the heading "House Rules Manual (GPO Access)" at http://www.rules.house.gov/house_rules_precedents.htm.

A number of principles can be drawn from these provisions. Impeachment applies only to the President, the Vice President, and those other federal officials or employees who fall within the category of "civil Officers of the United States." Impeachment will only lie where articles of impeachment are brought alleging that the individual to be impeached has engaged in conduct amounting to treason, bribery, or other high crimes and misdemeanors. The power to determine whether impeachment is appropriate in a given instance rests solely with the House of Representatives. The ultimate decisions both as to whether to impeach[38] and as to what articles of impeachment should be presented to the Senate for trial rest in the hands of the House.[39]

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[38] Historically, a number of circumstances are seen as having triggered or led to an impeachment investigation. *See* JEFFERSON'S MANUAL, *supra*, § 603 at 316. These have included charges made on the floor by a Member or Delegate; charges preferred by a memorial, usually referred to a committee for examination; a resolution dropped in the hopper by a Member and referred to a committee; a message from the President; charges transmitted from the legislature of a state or territory or from a grand jury; facts explored and reported by a House investigating committee; or a suggestion from the Judicial Conference of the United States, under 28 U.S.C. § 354(b), that the House may wish to consider whether impeachment of a particular federal judge would be appropriate. Prior to the expiration of the independent counsel provisions on June 30, 1999, an independent counsel, under 28 U.S.C. § 595(c), advised the House of Representatives of "substantial and credible information which such independent counsel receive[d], in carrying out the independent counsel's responsibilities ..., that may constitute grounds for an impeachment."

A resolution introduced by a Member and referred to a committee may take one of two general forms. It may be a resolution impeaching a specified person falling within the constitutionally prescribed category of "President, Vice President, and all civil Officers of the United States." Such a resolution would usually be referred directly to the House Committee on the Judiciary. *See, e.g.,* H.Res. 461 (impeaching Judge Harry Claiborne for high crimes and misdemeanors, first introduced June 3, 1986, and referred to the House Judiciary Committee; as later amended, this resolution was received in the House on August 6, 1986, from the Committee; it impeached Judge Claiborne for high crimes and misdemeanors and set forth articles of impeachment against him); H.Res. 625 (impeaching President Richard M. Nixon for high crimes and misdemeanors); H.Res. 638 (impeaching President Richard M. Nixon for high crimes and misdemeanors).

Alternatively, it may be a resolution requesting an inquiry into whether impeachment would be appropriate with regard to a particular individual falling within the constitutional category of officials who may be impeached. Such a resolution, sometimes called an inquiry of impeachment to distinguish it from an impeachment resolution of the type described above, would usually be referred to the House Committee on Rules, which would then generally refer it to the House Committee on the Judiciary. *See, e.g.,* H.Res. 304 (directing the House Committee on the Judiciary to undertake an inquiry into whether grounds exist to impeach President William Jefferson Clinton, to report its findings, and, if the Committee so determines, a resolution of impeachment; referred to House Committee on Rules November 5, 1997); H.Res. 627 (directing the Committee on the Judiciary to investigate whether there are grounds for impeachment of Richard M. Nixon, referred to the House Committee on Rules, and then to the House Judiciary Committee); H.Res. 627 (directing the Committee on the Judiciary to inquire into and investigate whether grounds exist for the impeachment of Richard M. Nixon); H.Res. 636 (seeking an inquiry into whether grounds exist for impeachment of President Richard M. Nixon). *See* the discussion in 3 DESCHLER'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, H. Doc. 94-661, ch. 14 § 5.10-5.11, at 482-84 and § 15, at 621-26 (1974) (DESCHLER'S). DESCHLER'S may be accessed through the House Rules Committee website, http://www.rules.house.gov/house_rules_precedents.htm. This, in turn, provides a link to http://www.access.gpo.gov/congress/house/precedents/deschler.html.

On February 6, 1974, the House passed H.Res. 803, "authoriz[ing] and direct[ing]" the Committee on the Judiciary "to investigate fully and completely whether sufficient grounds exist for the House of Representatives to exercise its constitutional power to impeach Richard M. Nixon, President of the United States of America." The Committee submitted H.Rept. No. 93-1305 to the House of Representatives on August 20, 1974. It included text of a resolution impeaching President Nixon and setting forth articles of impeachment against him, which was printed at 120 *Cong. Rec*. 29219, 29220 (August 20, 1974). However, because of the resignation of President Nixon, the House never voted on the resolution.

[39] Precedents differ as to whether the House will choose to initiate an impeachment investigation regarding allegations of misconduct occurring prior to the federal officer's commencing his current tenure of office. For example, in 1912, in response to H.Res. 511 (62nd Congress), the President transmitted to the House Judiciary Committee information related to an investigation by the U.S. Department of Justice of charges of improper conduct by Judge Robert W. Archbald, which had been brought to the President's attention by the Commissioner of the Interstate Commerce (continued...)

The Senate also has a unique role to play in the impeachment process. It alone has the authority and responsibility to try an impeachment brought by the House. The final decision as to whether to convict on any of the articles of impeachment is one that only the Senate can make. As to each article, a conviction must rest upon a two-thirds majority vote of the Senators present. In addition, should an individual be convicted on any of the articles, the Senate must determine the appropriate judgment: either removal from office alone, or, alternatively, removal and disqualification from holding further offices of "honor, Trust or Profit under the United States." The precedents suggest that removal flows automatically from conviction on one or more articles of impeachment,[40] but if the Senate chooses to impose an additional judgment disqualifying the individual convicted from holding future federal offices, a separate vote is necessary. A simple majority vote is required on such a judgment.[41] The Constitution precludes the President from extending executive clemency to anyone to preclude their impeachment by the House of Representatives or trial by the Senate.[42]

Conviction on impeachment does not foreclose the possibility of criminal prosecution arising out of the same factual situation. The four most recent impeachments of federal judges after the conclusion of criminal proceedings against them, including that of Judge Kent, indicate that, at least as to federal judges, the impeachment need not precede criminal proceedings arising out of the same facts. Nor does an acquittal in the criminal proceedings preclude a subsequent impeachment.

While the constitutional provisions establish the basic framework for American impeachments, they do not begin to address all of the issues which may arise during the course of a given impeachment proceeding or to answer all of the procedural questions which might become pertinent to an inquiry of this sort. To fill this void, a number of resources are available.

(...continued)

Commission. After its investigation, the House Judiciary Committee reported out a resolution impeaching Judge Archbald both for misconduct while he was in his then current position as a U.S. circuit court judge designated as a judge of the U.S. Commerce Court, and for misconduct in his previous position as a U.S. district judge. The House agreed to the resolution. Judge Archbald was tried in the Senate, convicted, removed from office, and disqualified from further federal offices.

In 1826, the House, without division, referred to a select committee the request by Vice President John C. Calhoun that the House investigate allegations against him relating to his past official conduct when he was Secretary of War. Similarly, in 1872, at the request of Vice President Schuyler Colfax, the House, pursuant to a resolution, appointed a special committee to investigate charges that Colfax, while Speaker of the House, had accepted a bribe to influence Members of the House. In 1873, the testimony received by the special committee was referred to the House Judiciary Committee to determine whether the testimony warranted articles of impeachment of any federal office not a Member of the House, or made proper further investigation of the case.

In contrast, in the 93rd Congress, when Vice President Spiro Agnew requested that an impeachment investigation be undertaken into charges that he may have committed impeachable offenses related to his conduct as a Governor of Maryland before commencing his tenure as Vice President, neither the Speaker nor the House took action on the substance of his request.

[40] This question was explored in the Senate impeachment trial of Judge Halsted Ritter, after he was convicted on the seventh article of impeachment brought against him. A colloquy arose after Senator Ashurst sent an order of judgment to the desk providing that Judge Ritter be removed from office. Based upon the language of Article II, Section 4 of the United States Constitution, the President Pro Tempore concluded that removal was automatic upon conviction in a Senate trial on one or more articles of impeachment. No vote was needed to remove the person convicted from office. 80 CONG. REC. 5607 (April 17, 1936).

[41] *See, e.g.*, vote to disqualify Judge Robert W. Archbald, 39 yeas, 35 nays, 49 CONG. REC. 1447-1448 (January 13, 1913); VI CANNON'S § 512.

[42] U.S. CONST., art. II, sec. 2, cl. 1.

Judicial Decisions Related to Impeachment

While no court has challenged the authority of the Senate to try impeachments, there are decisions regarding questions raised by the impeachment trials and convictions of Judges Walter L. Nixon, Jr., and Judge Alcee Hastings.[43] *Compare Nixon v. United States*, 506 U.S. 224 (1993), *affirming*, 938 F.2d 239 (D.C. Cir. 1991), *affirming* 744 F. Supp. 9 (D.D.C. 1990), with *Hastings v. United States*, 802 F. Supp. 490 (D.D.C. 1992), *vacated and remanded on court's own motion*, 988 F.2d 1280 (Table Case), 1993 U.S. App. LEXIS 11592 (unpublished per curiam vacating and remanding for reconsideration in light of *Nixon v. United States*, *supra*) (1993), *dismissed*, 837 F. Supp. 3 (1993). In both cases, the Plaintiffs challenged the Senate's procedure under Rule XI of the "Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials," which provides:

> XI. That in the trial of any impeachment the Presiding Officer of the Senate, if the Senate so orders, shall appoint a committee of Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.
>
> Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before the committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

Former Judge Nixon, "arguing that the Senate's failure to give him a full evidentiary hearing before the entire Senate violated its constitutional duty to "try" all impeachments[,] ... sought a declaratory judgment that his conviction by the Senate was void and that his judicial salary and privileges should be reinstated from the date of his conviction. The district court held that his claim was nonjusticiable." 938 F.2d at 241. The U.S. Court of Appeals for the District of Columbia Circuit agreed. *Id.* Judge Williams, writing for the court, determined that the constitutional language granting the Senate the "sole Power to try all impeachments" also "gives it sole discretion to choose its procedures." *Id*. at 245. This "textual commitment of impeachment trials to the Senate," coupled with the need for finality, led the court to apply the political

[43] *Cf*. Waggoner v. Hastings, 816 F. Supp. 716, 719 (S.D. Fla. 1993) (in case brought seeking to enjoin swearing in of elected Member of the U.S. House of Representatives, court granted summary judgment to the defendant, rejecting plaintiff's argument that conviction on impeachment and removal from office necessarily included disqualification from holding future office under the United States); Hastings v. United States Senate, 716 F. Supp. 38 (D.D.C. 1989), *aff'd without opinion*, 887 F.2d 332 (D.C. Cir. 1989) (plaintiff judges sought preliminary injunctive and declaratory relief against United States Senate, Impeachment Trial Committee, Secretary of Senate, and Public Printer. District court dismissed, finding the issues nonjusticiable. The U.S. Court of Appeals for the D.C. Circuit affirmed without published opinion. The appellate court's memorandum opinion, available on LEXIS at 1989 U.S. App. LEXIS 15883, deemed the Appellants' claims premature, basing its decision solely on considerations of ripeness and vital comity concerns fundamental to the balance of power established by the Constitution).

question doctrine in determining that the issue presented by former Judge Nixon was nonjusticiable. *Id.*

Judge Randolph, in his concurrence, framed the question before the court as "whether the judiciary can pass upon the validity of the Senate's procedural decisions. My conclusion that the courts have no such role to play in the impeachment process rests on my interpretation of the Constitution." *Id.* at 248. His analysis seems to focus specifically upon the text of the constitutional grant to the Senate of the sole power to try impeachments and upon the framers' intentional exclusion of the Judiciary from a role in the impeachment process, rather than upon the political question doctrine. Judge Edwards concurred in the judgment but dissented in part. He would have found former Judge Nixon's constitutional challenge justiciable, but would find "that the Senate's use of a special committee to hear witnesses and gather evidence did not deprive Nixon of any constitutionally protected right." *Id.*

The *Nixon* case was decided by the Supreme Court on January 13, 1993. *Nixon v. United States*, 506 U.S. 224 (1993). Chief Justice Rehnquist delivered the opinion of the Court for himself and Justices Stevens, O'Connor, Scalia, Kennedy and Thomas. The Court held the issue before them to be nonjusticiable. The Chief Justice based this conclusion upon the fact that the impeachment proceedings were textually committed in the Constitution to the legislative branch. In addition, the Court found the "lack of finality and the difficulty in fashioning relief counsel[led] against justiciability." *Id.* at 236. To open "the door of judicial review to the procedures used by the Senate in trying impeachments would 'expose the political life of the country to months, or perhaps years, of chaos.'" *Id.*, *quoting the court below*, 938 F.2d, at 246. The Court found that the word "try" in the Impeachment Clause did not "provide an identifiable textual limit on the authority which is committed to the Senate." *Id.* at 238.

Justice Stevens, in his concurring opinion, emphasized the significance of the framers' decision to assign the impeachment power to the legislative branch. *Id.* Justice White, joined by Justice Blackmun, concurred in the judgment, but found nothing in the Constitution to foreclose the Court's consideration of the constitutional sufficiency of the Senate's Rule XI procedure. Justices White and Blackmun, addressing the merits of the claim before the Court, were of the opinion that the Senate had fulfilled its constitutional obligation to "try" Judge Nixon. *Id.* at 239.

Justice Souter agreed with the majority that the case presented a nonjusticiable political question, although his reasoning was somewhat different.

> The Impeachment Trial Clause commits to the Senate "the sole Power to try all Impeachments," subject to three procedural requirements: the Senate shall be on oath or affirmation; the Chief Justice shall preside when the President is tried; and conviction shall be upon the concurrence of two-thirds of the Members present. U.S. Const., Art. I, §3, cl. 6. It seems fair to conclude that the Clause contemplates that the Senate may determine, within broad boundaries, such subsidiary issues as the procedures for receipt and consideration of evidence necessary to satisfy its duty to "try" impeachments.

Id. at 253. Justice Souter found the conclusion that the case presented a non-justiciable political question supported by the "'the unusual need for unquestioning adherence to a political decision already made,' [and] 'the potentiality of embarrassment from multifarious pronouncements from various departments on one question.'" *Id.*, *quoting Baker v. Carr*, 369 U.S. 186, 217 (1962). He noted, however, that

> [i]f the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin-toss, or upon a summary determination that an officer of the United States was simply a "bad guy" ... judicial interference might well be appropriated. In such circumstances, the Senate's action might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence.

Id. at 253-54.

In contrast to the decisions in *Nixon*, Judge Sporkin of the United States District Court for the District of Columbia initially ruled for the plaintiff in *Hastings v. United States*, 802 F. Supp. 490, 492 (D.D.C. 1992). The court there framed the question before it as follows:

> The key issue in this case is whether a life-tenured Article III judge who has been acquitted of felony charges by a petit jury can thereafter be impeached and tried for essentially the same alleged indiscretion by a committee of the United States Senate consisting of less than the full Senate. This court determines that the answer is no.

Judge Sporkin determined that his court was not foreclosed from reaching a decision in the *Hastings* case by what might have been viewed as a controlling court of appeals decision in *Nixon*, because the Supreme Court had agreed to take *certiorari* in *Nixon* on issues identical to those before him. Judge Sporkin concluded that the issue before him was justiciable and, further, that the Rule XI procedure did not provide an adequate "trial" before the full Senate. *Id.* at 501. In particular, the court considered the taking of evidence a process which required the presence of all the Senators, so that each could judge credibility with his or her own eyes and ears.[44] Judge Sporkin's decision seems to turn upon his reading of the implications of the constitutional phrase giving the Senate the sole power to "try all Impeachments." In light of his analysis, Judge Sporkin granted former Judge Hastings' motion for summary judgment, ordering that the Senate impeachment conviction and judgment be vacated and that a new trial by the full Senate be afforded the plaintiff. Judge Sporkin stayed his judgment pending appeal.

After the Supreme Court's decision in *Nixon v. United States*, *supra*, the United States Court of Appeals for the District of Columbia Circuit, on its own motion, vacated and remanded the *Hastings* decision for reconsideration in light of *Nixon*. *Hastings v. United States*, 988 F.2d 1280 (Table Case), 1993 U.S. App. LEXIS 11592 (unpublished per curiam) (D.C. Cir. 1993). On remand, Judge Sporkin dismissed the case. *Hastings v. United States*, 837 F. Supp. 3 (D.D.C. 1993). In doing so reluctantly, Judge Sporkin emphasized the factual differences between the two cases, but concluded that the *Nixon* decision compelled dismissal of the case before him.

[44] In so doing, while Judge Sporkin appended a copy of Rule XI to his decision, he did not discuss the Rule XI requirement that all rulings as to competency, materiality or relevancy must be made by the full Senate, nor did he address the fact that the Rule XI procedure permits the full Senate to take further testimony or to take all evidence in open Senate. Judge Sporkin described the Rule XI committee as a deliberative body, 802 F. Supp. at 494, but seems not to have focused upon the fact that a committee formed to take evidence pursuant to Rule XI reports to the Senate a certified copy of the transcript of proceedings and testimony given before the committee. These committees do not appear to have made any recommendations as to the merits of the impeachment cases before them.

Some Basic Research Tools to Assist in Impeachment Proceedings

The basic procedures to be followed by the House of Representatives are included in JEFFERSON'S MANUAL, published in CONSTITUTION, JEFFERSON'S MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, ONE HUNDRED TENTH CONGRESS, H.R. Doc. 109-157, 109th Cong., 2d Sess. (2007), particularly §§ 31, 38, 41, 162, 173-176, 180, 592, and Sec. LIII, §§ 601-620.[45] The MANUAL states general procedural principles to be applied in the House of Representatives, accompanied by references to particular precedents included in HINDS' PRECEDENTS OF THE HOUSE REPRESENTATIVES (1907) (hereinafter HINDS') and CANNON'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES (1936) (hereinafter CANNON'S),[46] and a discussion of relevant English parliamentary procedure and practice. Also of great assistance in exploring precedents in this area is DESCHLER'S PRECEDENTS OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ch. 14, H.R. Doc. No. 661, 94th Cong., 2d Sess. 389-729 (1977) (hereinafter DESCHLER'S).[47] Another valuable source is WM. HOLMES BROWN AND CHARLES W. JOHNSON, HOUSE PRACTICE, A GUIDE TO THE RULES, PRECEDENTS, AND PROCEDURES OF THE HOUSE, 108th Congress, 1st Session (2003), particularly Chapter 27, §§ 1-10.[48]

[45] As noted above, this document is available on the Government Printing Office website at http://www.gpoaccess.gov/hrm/browse_110.html. It may be accessed through a link on the website of the House Committee on Rules at http://www.rules.house.gov/house_rules_precedents.htm, where it is listed as the "House Rules Manual (GPO Access)."

[46] HINDS', CANNON'S, and DESCHLER'S include references to provisions of the Constitution, the laws, and decisions of the United States Senate, as well as precedents pertaining to the House of Representatives. These documents may also be accessed through the House Rules Committee website at http://www.rules.house.gov/house_rules_precedents.htm. Links to all three of these documents may be found by clicking on either the link to "DESCHLER'S PRECEDENTS OF THE U.S. HOUSE OF REPRESENTATIVES" or to "HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES" on this page of the House Rules Committee website, and then clicking on the highlighted links for "[Hinds' Precedents]," "[Cannon's Precedents]," or "[Deschler's Precedents]."

[47] The REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL (August 1993), published by the Commission, and the accompanying EXECUTIVE SUMMARY OF THE REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL, RESEARCH PAPERS OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL, Volumes I and II, and HEARINGS OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL may also provide useful information on impeachment and judicial discipline. For other recent congressional materials relating to impeachment and judicial discipline, *see, e.g.*, Byrd, R., "Impeachment," 2 THE SENATE, 1789-1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE 59, S. Doc. No. 100-20 (1991) (Bicentennial ed., Wolff, W., ed.); *Impeachment of Article III Judges: Hearing before the Committee on the Judiciary of the United States Senate, Subcomm. on the Constitution*, S. Hrg. 101-1275, 101st Cong., 2d Sess. (1990); *Judicial Independence: Discipline and Conduct: Hearing on H.R. 1620, H.R. 1930, and H.R. 2181 before the Comm. on the Judiciary of the House of Representatives, Subcomm. on Courts, Intellectual Property, and Administration of Justice*, 101st Cong., 1st Sess. (1990).

[48] This may be accessed through the House Rules Committee website under the heading of "House Practice: A Guide to the Rules, Precedents and Procedures of the House," at http://www.rules.house.gov/house_rules_precedents.htm. This, in turn, links to the document at http://www.gpoaccess.gov/hpractice/browse_108.html. Chapter 27 may be found in text or pdf format under the heading of "IMPEACHMENT."

Senate conduct of impeachment trials is governed by the "Rules of Procedure and Practice in the Senate when Sitting on Impeachment Trials." The current form of these rules dates from the 1986 impeachment proceedings against Judge Harry E. Claiborne, although many of the rules predate the Claiborne impeachment.[49] PROCEDURE AND GUIDELINES FOR IMPEACHMENT TRIALS IN THE SENATE (REVISED EDITION), S. Doc. No. 33, 99th Cong., 2d Sess. (August 15, 1986), was prepared at the time of the Claiborne proceeding pursuant to S.Res. 439, 99th Cong., 2d Sess., to assist the Senators in understanding and utilizing the Senate impeachment trial procedure, using examples from past impeachment proceedings to follow the process from its inception, upon receipt of a message from the House of Representatives informing the Senate that the House has voted impeachment, adopted articles, and appointed managers, to its conclusion with the adjournment *sine die* of the Senate sitting as a Court of Impeachment. As these are Senate rules, that body can, where it deems such action appropriate, revise or amend the rules. Consideration of the appropriateness of such revisions is not unusual when a Senate impeachment trial is anticipated or is at a very early stage of the Senate proceedings.[50]

A Brief History and Some Preliminary Issues Relating to Impeachment

In any impeachment inquiry, the Members of the legislative branch must confront some preliminary questions to determine whether an impeachment is appropriate in a given situation. The first of these questions is whether the individual whose conduct is under scrutiny falls within the category of President, Vice President, or "civil Officers of the United States" such that he is vulnerable to impeachment. One facet of this question in some cases is whether the resignation of the individual under scrutiny forecloses further impeachment proceedings against him. A second preliminary question is whether the conduct involved constitutes "treason, bribery, or other high crimes or misdemeanors." After a brief look at American impeachments and preliminary inquiries in historical context, we will turn to an examination of these issues.

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[49] In connection with the impeachment trial of Judge G. Thomas Porteous, Jr., under Sec. 7 of S.Res. 457 (111th Cong.), "the articles of impeachment, the answer, and the replication, if any, together with the provisions of the Constitution on impeachment and the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials, shall be printed under the direction of the Secretary as a Senate document." This is consistent with recent past practice, *see, e.g.*, IMPEACHMENT OF PRESIDENT WILLIAM JEFFERSON CLINTON, CONSTITUTIONAL PROVISIONS, RULES OF PROCEDURE AND PRACTICE IN THE SENATE WHEN SITTING ON IMPEACHMENT TRIALS; ARTICLES OF IMPEACHMENT AGAINST PRESIDENT WILLIAM JEFFERSON CLINTON; PRESIDENT CLINTON'S ANSWER; AND REPLICATION OF THE HOUSE OF REPRESENTATIVES, S. Doc. 106-2, 106th Cong., 1st Sess. 3 (January 13, 1999) (this document may be found among those at http://www.access.gpo.gov/congress/senate/miscspub.html); IMPEACHMENT OF JUDGE ALCEE L. HASTINGS CONSTITUTIONAL AND STATUTORY PROVISIONS; RULES OF PROCEDURE AND PRACTICE IN THE SENATE WHEN SITTING ON IMPEACHMENT TRIALS, ARTICLES OF IMPEACHMENT AGAINST JUDGE ALCEE L. HASTINGS, JUDGE HASTINGS' ANSWER, AND REPLICATION OF THE HOUSE OF REPRESENTATIVES, S. Doc. 101-3, 101st Cong., 1st Sess. 11 (February 2, 1989); IMPEACHMENT OF JUDGE WALTER L. NIXON, JR., CONSTITUTIONAL PROVISIONS; RULES OF PROCEDURE AND PRACTICE IN THE SENATE WHEN SITTING ON IMPEACHMENT TRIALS; ARTICLES OF IMPEACHMENT AGAINST JUDGE WALTER L. NIXON, JR., JUDGE NIXON'S ANSWER; AND REPLICATION OF THE HOUSE OF REPRESENTATIVES, S. Doc. 101-8, 101st Cong., 1st Sess. 7 (May 11, 1989).

[50] Information about the Senate's impeachment role may be found on the United States Senate website at http://senate.gov/artandhistory/history/common/briefing/Senate_Impeachment_Role.htm.

In the history of the United States, 16 full impeachment trials have taken place.[51] A 17th Senate trial, that of Mark H. Delahay, of the U.S. District Court for the District of Kansas, was begun when the Members of the House appeared before the bar of the Senate to impeach the judge at the

[51] The House also impeached and voted articles of impeachment against George W. English, District Judge for the United States District Court for the Eastern District of Illinois (impeachment proceedings from 1925-1926), and the House Managers appeared before the Senate to advise the Senate of the House action. The Senate organized for the impeachment trial the next day, the required oath was administered to the Senators, the Managers appeared, and a summons was issued to Judge English to appear to answer the articles of impeachment brought against him. On the date required, Judge English appeared with counsel and presented his answer. The following day the House Managers filed their replication to the answer, and the Senate set the trial for November 10, 1926. However, on November 4, 1926, Judge English resigned from office and the President accepted his resignation. On November 10, 1926, the chairman of the House Managers advised the Senate of the judge's resignation and its acceptance by the President, and sought a delay to permit the Managers to advise the House of their recommendation that the impeachment proceedings be dismissed. The Senate trial was adjourned until December 13, 1926. On December 11, 1926, while stating that the resignation did not affect the Senate's authority to try the matter, the House Managers recommended to the House that the impeachment proceedings be discontinued. VI CANNON'S §§ 544-547, at 778-785. The House voted to accept the Managers' recommendation. 68 *Cong. Rec*. 297 (1926), discussed in a Committee Print entitled CONSTITUTIONAL GROUNDS FOR PRESIDENTIAL IMPEACHMENT, REPORT BY THE STAFF OF THE IMPEACHMENT INQUIRY, COMMITTEE ON THE JUDICIARY, U.S. HOUSE OF REPRESENTATIVES, 93rd Congress, 2d Sess. 52-54 (Comm. Print February 1974). The Senate, having been advised by the House Managers that the House wished to discontinue the proceedings in light of Judge English's resignation, passed a resolution dismissing the impeachment proceedings on December 13, 1926. 68 *Cong. Rec*. 344, 348 (1926). This matter is sometimes counted as a 17th impeachment proceeding as the preliminary matters in the Senate had begun in preparation for a full trial on the merits, and the Senate terminated the impeachment proceedings by formal vote. *Compare*, the inclusion of Judge English's impeachment in the list of Senate impeachment trials on the United States Senate website found at http://www.senate.gov/artandhistory/history/common/briefing/Senate_Impeachment_Role.htm, *with* VI CANNON'S, ch. CII, listing Judge English's impeachment proceedings among "Impeachment Proceedings Not Resulting in Trial."

Like the impeachment proceedings regarding Judge English, those with respect to Judge Mark H. Delahay of the U.S. District Court for the District of Kansas are among those included in the list of Senate impeachment trials on the U.S. Senate website. Judge Delahay was impeached by the House of Representatives on February 28, 1873, at the end of the third session of the Forty-Second Congress. The impeachment resolution did not include articles of impeachment against Judge Delahay. The House anticipated presenting articles of impeachment to the Senate in the next Congress. On the same day, as ordered by the House, a committee of three Members of the House appeared before the bar of the Senate and impeached Judge Delahay for "high crimes and misdemeanors in office." Representative Butler, on behalf of the committee:

> further acquainted the Senate, by order of the House, that the House will in due time furnish particular articles against said Delahay and make good the same. And this committee is further charged by the House to demand of the Senate that they will take order for the appearance of Mark H. Delahay, as such judge, to answer the same.

III HINDS', § 2505, at 1010. The Presiding Officer of the Senate stated that, "The Senate will take order in the premises, of which due notice shall be given to the House of Representatives." *Id*. Later the same day, the Senate ordered the Secretary of the Senate to inform the House that the Senate would receive articles of impeachment against Mark H. Delahay, "whenever the House shall be ready to receive the same." *Id.* The committee reported back to the House that it had carried out its responsibilities. The HOUSE JOURNAL, at 560, indicates that the House also received a message from the Senate advising the House that the Senate was ready to receive articles of impeachment against Judge Delahay. On December 12, 1873, he resigned from office. No further proceedings took place on the Delahay impeachment. *Id.*

In addition, in 1974, the House Committee on the Judiciary filed its report on the impeachment inquiry with regard to President Richard M. Nixon with the full House. It included a resolution impeaching President Nixon and setting forth articles of impeachment against him. However, because President Nixon resigned from office, the House did not vote on the resolution and took no further action with respect to impeachment of the former President. *See*, H.Res. 803; H.Rept. 93-1305, 93rd Cong., 2d Sess. (1974) (the report submitted by the House Judiciary Committee recommending President Nixon's impeachment). There is an interesting discussion of the proceedings in the House regarding the impeachment inquiry with respect to President Nixon in 3 DESCHLER'S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES, ch. 14, 15, H.R. Doc. No. 661, 94th Cong. 2d Sess. (1977).

end of the third session of the 34th Congress. No articles of impeachment were presented at that time. After the judge resigned, there were no further proceedings. An 18th Senate trial, that of George W. English, U.S. District Judge for the Eastern District of Illinois, was commenced in the Senate, but did not go forward to a judgment on the merits of the case because of the judge's resignation and the House Managers' recommendation and the Senate's agreement that the impeachment proceedings be dismissed. Similarly, a 19th Senate trial, regarding Samuel B. Kent, U.S. District Judge for the Southern District of Texas, ended when the Senate agreed to a motion by Senator Harry Reid to dismiss the articles of impeachment after the judge resigned and the House Managers requested that the impeachment proceedings be discontinued.[52]

The other 16 who have thus far been tried in the Senate include William Blount, United States Senator from Tennessee (impeachment proceedings from 1797-1799); John Pickering, District Judge for the United States District Court for the District of New Hampshire (1803-1804); Samuel Chase, Associate Justice of the United States Supreme Court (1804-1805); James H. Peck, District Judge for the United States District Court for the District of Missouri (1826-1831); West H. Humphreys, District Judge for the United States District Court for the District of Tennessee (1862); Andrew Johnson, President of the United States (1867-1868); William W. Belknap, Secretary of War (1876); Charles Swayne, District Judge for the United States District Court for the Northern District of Florida (1903-1905); Robert W. Archbald, Circuit Judge, United States Court of Appeals for the Third Circuit, serving as Associate Judge for the United States Commerce Court (1912-1913); Harold Louderback, District Judge, United States District Court for the Northern District of California (1932-1933); Halsted Ritter, District Judge of the United States District Court for the Southern District of Florida (1936); Harry E. Claiborne, United States District Judge for the District of Nevada (1986); Alcee Hastings, United States District Judge for the Southern District of Florida (1988-1989); Walter L. Nixon, Jr., United States District Judge for the Southern District of Mississippi (1988-1989), and William Jefferson Clinton, President of the United States (1998), and G. Thomas Porteous, United States District Judge from the Eastern District of Louisiana.[53] Of these, eight were convicted in their impeachment trials: Judge Pickering, Judge Humphreys, Judge Archbald, Judge Ritter, Judge Claiborne, Judge Hastings,[54] Judge Nixon,[55] and Judge Porteous.[56]

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[52] 155 *Cong. Rec*. S7832-7833 (daily ed. July 22, 2009). *See also*, footnotes 24 - 31, *supra*, and accompanying text.

[53] Prior to Judge Porteous's impeachment trial in the 111th Congress, the most recent impeachment trial that went to a judgment on the merits was that of President William Jefferson Clinton. H.Res. 525, reported by the House Committee on Rules on September 10, 1998, H.Rept. 105-703, was agreed to by the House the following day by a vote of 363-63 (Roll No. 425). It provided for review by the House Judiciary Committee of a communication from an independent counsel on September 8, 1998, transmitting a determination under that "substantial and credible information received by the independent counsel" in carrying out his duties "may constitute grounds for an impeachment of the President of the United States." The resolution required the House Judiciary Committee to review this communication to determine whether sufficient grounds exist to recommend to the House that an impeachment inquiry be commenced. On October 7, 1998, the House Judiciary Committee reported an original measure, H.Res. 581, authorizing and directing that committee to investigate whether sufficient grounds existed to impeach President William Jefferson Clinton, H.Rept. 105-795. The following day, the House agreed to the measure by a vote of 258-176 (Roll No. 498). On December 19, 1998, the House approved an impeachment resolution including two articles of impeachment against President Clinton for perjury before a federal grand jury and obstruction of justice, H.Res. 611 (105th Cong.) (Roll No. 543 and Roll No. 545, respectively), 144 *Cong. Rec.* 28110, 28111 (December 19, 1998). Two other articles of impeachment reported by House Judiciary Committee failed to pass the House. (Roll No. 544 and Roll No. 546), 144 lain *Cong. Rec.* 28111, 28112 (December 19, 1998). On February 12, 1999, the Senate acquitted him on both articles of impeachment by votes of 45-55 (Record Vote No. 17), and 50-50 (Record Vote No. 18), respectively. 145 *Cong. Rec*. S1458-S1459 (February 12, 1999).

[54] Both former Judges Nixon and Hastings challenged the constitutionality of the Senate procedure used in their impeachment trials. *Nixon v. United States*, 506 U.S. 224 (1993), *affirming*, 938 F.2d 239 (D.C. Cir. 1991), *affirming*, (continued...)

In addition to those impeachment investigations which have resulted in Senate trials, there have been a number of instances in which the impeachment process has been initiated in the House of Representatives that have not resulted in articles of impeachment being voted against the subjects of those inquiries. For example, in 1872, the House of Representatives adopted a resolution authorizing the House Committee on the Judiciary to investigate the conduct of District Judge Mark H. Delahay.[57] The following year, the committee proposed an impeachment resolution for "high crimes and misdemeanors in office." The resolution was adopted by the House.[58] However, Judge Delahay resigned from office before articles of impeachment were prepared against him, and the House took no further action.

Other examples of impeachment resolutions, inquiries, or investigations regarding federal judges that, for various reasons,[59] did not result in articles of impeachment being voted by the House include those regarding: Lebbeus R. Wilfley, Judge of United States Court for China (1908); Cornelius H. Hanford, United States Circuit Judge for the Western District of Washington (1912); Emory Speer, United States District Judge for the Southern District of Georgia (1913); Daniel Thew Wright, Associate Justice of the Supreme Court of the District of Columbia (1914); Alston G. Dayton, United States District Judge for the Northern District of West Virginia (1915); Kenesaw Mountain Landis, United States District Judge for the Northern District of Illinois (1921); William E. Baker, United States District Judge for the Northern District of West Virginia (1925); Frank Cooper, United States District Judge for the Northern District of New York (1927); Francis A. Winslow, United States District Judge for the Southern District of New York (1929); Harry B. Anderson, United States District Judge for the Western District of Tennessee (1930); Grover M. Moscowitz, United States District Judge for the Eastern District of New York (1930); Harry B. Anderson, United States District Judge for the Western District of Tennessee (1931); James Lowell, United States District Judge for the District of Massachusetts (1933-1934); Joseph

(...continued)

744 F. Supp. 9 (D.D.C. 1990); *Hastings v. United States*, 802 F. Supp. 490 (D.D.C. 1992), *vacated and remanded*, 988 F.2d 1280 (Table Case), 1993 U.S. App. 11592 (unpublished per curiam) (D.C. Cir. 1993), *dismissed*, 837 F. Supp. 3 (D.D.C. 1993). In *Nixon*, the plaintiff's claim was found nonjusticiable by the Supreme Court and the courts below. In *Hastings*, the United States District Court for the District of Columbia determined that the Senate's Rule XI procedure was constitutionally flawed, vacated Judge Hastings' impeachment conviction and judgment, ordered the Senate to try Judge Hastings before the full Senate, and stayed the effect of this decision pending appeal. After the Supreme Court's *Nixon* decision, the *Hastings* appeal was vacated and remanded on the court's own motion for reconsideration in light of *Nixon*. The case was dismissed on remand.

[55] For a crisp summary of the first 12 of these impeachments, see the Appendix to Fenton, P., *The Scope of the Impeachment Power*, 65 *NW. U. L. Rev.* 719 (1970), *reprinted in* H. COMM. ON THE JUDICIARY, 93RD CONG., 1ST SESS., IMPEACHMENT, SELECTED MATERIALS 663, 682-88 (Comm. Print October 1973), and in H. COMM. ON THE JUDICIARY, 105TH CONG., 2D SESS., IMPEACHMENT, SELECTED MATERIALS 1799, 1818-24 (Comm. Print November 1998). For an overview of historical materials and scholarly commentary regarding grounds for impeachment, including summaries of the articles of impeachment from that of Senator William Blount (1797-1799) through Judge Walter Nixon (1988-89), see CRS Report 98-882, *Impeachment Grounds: A Collection of Selected Materials*, by Charles Doyle.

[56] For a more detailed discussion of the impeachment of Judge Porteous, see "Summary of Impeachment Proceedings in the 111th Congress," *supra*, at pages 1-4.

[57] 46 *Cong. Globe*, 42nd Cong., 2d Sess. 1808 (1872).

[58] 46 *Cong. Globe*, 42nd Cong., 3d Sess. 1900 (1873).

[59] For example, in past impeachment investigations with respect to federal judges, such reasons have included a determination that impeachment was not warranted, resignation of the officer involved, retirement of the officer involved, adjournment of Congress with no further action in the next Congress, tabling of the measure, or referral of the matter to certain Executive Branch departments for appropriate action. *See*, Appendix D-1 to Warren S. Grimes, "The Role of the United States House of Representatives In Proceedings To Impeach and Remove Federal Judges," from I RESEARCH PAPERS OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE & REMOVAL 39, 117-133 (1993).

Molyneaux, United States District Judge for the District of Minnesota (1934); Samuel Alschuler, United States Circuit Judge for the Seventh Circuit (1935); Albert Johnson, United States District Judge for the Middle District of Pennsylvania and Albert Watson, United States District Judge for the Middle District of Pennsylvania (1944); Alfred Murrah, Chief Judge of the Court of Appeals for the Tenth Circuit, Stephen Chandler, United States District Judge for the Western District of Oklahoma, and Luther Bohanon, United States District Judge for the Eastern, Northern and Western Districts of Oklahoma (1966) (resolution referred to the Committee on Rules, but not acted upon); William O. Douglas, Associate Justice of the United States Supreme Court (1970); Frank J. Battisti, United States District Court for Ohio (1978); and Manuel L. Real, United States District Judge for the Central District of California (2006).[60] In 1976, in the wake of the filing of the lawsuit in *Atkins v. United States*, 214 Ct. Cl. 186, 556 F.2d 1028 (1977), *cert. denied*, 434 U.S. 1009 (1978)[61] (a case filed by 140 federal judges (1) seeking to recover additional compensation under the theory that failure to increase the nominal salaries of federal judges during an inflationary period amounted to a diminution of compensation in violation of Article III, Sec. 1 of the U.S. Constitution and (2) challenging the constitutional validity of a one-House veto provision in the Federal Salary Act of 1967, 2 U.S.C. §§ 351 *et seq.*), two resolutions were introduced to impeach judges involved in the case.[62] These resolutions were also referred to the House Judiciary Committee. No further action was taken.

Among the inquiries into conduct of executive branch officers which did not result in Senate trials were those regarding: H. Snowden Marshall, United States District Attorney for the Southern District of New York (1916-1917); Attorney General Harry M. Daugherty (1922-1924); Clarence C. Chase, Collector of Customs at the Port of El Paso, Texas (1924); Andrew W. Mellon, as Secretary of the Treasury (1932) (discontinued before completion of the investigation because of Mellon's resignation from the position of Secretary of the Treasury upon his nomination and confirmation as Ambassador to the Court of St. James); and President Herbert Hoover (1933) (motion to impeach laid on the table); Frances Perkins, Secretary of Labor, James L. Houghteling, Commissioner of the Immigration and Naturalization Service of the Department of Labor, and Gerard K. Reilly, Solicitor of the Department of Labor (1939); President Harry Truman (1952); President Richard M. Nixon (1973-1974) (President's resignation occurred before the Articles of Impeachment were voted upon by the House; report of the Judiciary Committee recommending impeachment and including articles of impeachment submitted to the House; House adopted a resolution accepting the report, noting the action of the committee and commending its chairman and Members for their efforts, but no further action was taken upon the impeachment); and Andrew Young, United States Ambassador to the United Nations (1978) (measure considered in House; motion to table passed by House). The following are examples of those which went no further than committee or subcommittee referral: resolution to impeach the Ambassador to Iran (1976) (referred to House Judiciary Committee); resolution to impeach United States Ambassador to the United Nations (1977) (referred to House Judiciary Committee); resolution directing House Judiciary Committee to investigate whether to impeach Attorney General of United States (1978) (referred to House Rules and Administration); resolutions to impeach the Chairman of the Board of Governors of the Federal Reserve System (1983 and 1985)

[60] For a chart listing House impeachment investigations regarding federal judges from Judge George Turner, Northwest Territory, in 1796 to Judge Walter Nixon, U.S. District Court for the Southern District of Mississippi, in 1988-89, see Appendix D-1 to Warren S. Grimes, "The Role of the United States House of Representatives In Proceedings To Impeach and Remove Federal Judges," from I RESEARCH PAPERS OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE & REMOVAL 39, 117-133 (1993).

[61] *Cf.,United States v. Will*, 449 U.S. 200 (1980).

[62] H.Res. 1066 (94th Cong.) and H.Res. 1138 (94th Cong.).

(referred to Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary); resolutions to impeach members of the Federal Open Market Committee (1983 and 1985) (referred to Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee); resolutions to impeach President Ronald Reagan (1983 and 1987) (referred to House Judiciary Committee); and resolutions to impeach President George W. Bush (two in 1991, one in 2006, two in 2008) (referred to the House Committee on the Judiciary); a resolution impeaching Independent Counsel Kenneth Starr (1998) (referred to House Judiciary Committee);[63] a resolution directing the House Committee on the Judiciary to undertake an inquiry into whether grounds existed to impeach President William Jefferson Clinton, to report its findings, and, if the committee so determined, a resolution of impeachment (1998) (referred to House Committee on Rules);[64] a resolution to impeach Secretary of Defense Donald R. Rumsfeld (2004) (referred to House Judiciary Committee, and then to the Subcommittee on the Constitution); a resolution to impeach Vice President Richard B. Cheney (two in 2007) (one referred to House Judiciary, the other to House Judiciary Committee, and then to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties); and a resolution directing the House Judiciary Committee to investigate whether Attorney General Alberto R. Gonzales should be impeached for high crimes and misdemeanors (2007) (referred to the House Rules Committee).

As is apparent from the instances noted above, the impeachment mechanism, while not used frequently, has provided a means of exploring allegations of misconduct involving, with the one notable exception of Senator Blount, civil officers from both the judicial and executive branches. The bulk of the inquiries begun have not resulted in impeachment trials; of those which have gone to trial, less than half of them have led to convictions, all involving federal judges. The impeachment process provides a means of monitoring and checking misconduct by such officials through the use of a legislative forum. The mechanism is a cumbersome one which takes time away from other legislative business. Yet its very cumbersomeness might be viewed as necessary to minimize the chance that so serious a course would be engaged in lightly; in this light, its complex and somewhat unwieldy nature could be considered an attempt to deter unwarranted legislative intrusions into the business and personnel of the other two branches. The impeachment process might be seen as a constitutional effort to balance these two countervailing forces.

Who Are "civil Officers of the United States" Under Article II, Sec. 4 of the Constitution?

A perusal of the examples included in the list of impeachment trials and of inquiries with an eye towards possible impeachment may provide some indication as to what sort of officials have been considered "civil Officers of the United States" within the scope of the impeachment powers. The term is not defined in the Constitution. With the exception of the trial of Senator Blount, all of those listed above were from either the executive or the judicial branch. Senator Blount was not

[63] Another resolution impeaching Independent Counsel Kenneth Starr for high crimes and misdemeanors was also introduced in 1998. H.Res. 545 was introduced on September 18, 1998, and referred to the House Judiciary Committee. On September 23, 1998 it was considered as a matter of privilege. A motion to table the measure was agreed to by a vote of 340-71 (Roll No. 453) on the same day.

[64] H.Res. 304. In contrast, H.Res. 525, reported by the House Committee on Rules on September 10, 1998, H.Rept. 105-703, was agreed to by the House the following day by a vote of 363-63 (Roll No. 425). H.Res. 581, reported by the House Judiciary Committee on October 7, 1998, H.Rept. 105-795, was agreed to by the House on October 8, 1998, by a vote of 258-176 (Roll No. 498). For further information on the impeachment of President William Jefferson Clinton, see fn. 27, *supra.*

convicted in his impeachment trial. During that trial the Congress wrestled with the question of whether a Senator was a civil officer subject to impeachment. The Senate concluded that he was not and that it lacked jurisdiction over him for impeachment purposes. He was acquitted on that basis.[65]

Clearly the precedents show that federal judges have been considered to fall within the sweep of the "Civil Officer" language. There have been instances where questions have been raised as to whether the congressional printer,[66] a former vice-consul-general,[67] or a territorial judge[68] could be impeached. In addition, a House committee concluded that a Commissioner of the District of Columbia was not a civil officer for impeachment purposes.[69] It has been argued that the term "civil officer" for impeachment purposes should at least be deemed to include officers appointed in accordance with the Appointments Clause of the Constitution, Art. II, Sec. 2, Cl. 2, which provides in pertinent part:

> He shall ... nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Reliance in this argument is placed upon a statement of the Supreme Court in *United States v. Mouat*, 124 U.S. 303 (1888), in discussing this provision, that

> Unless a person in the service of the government hold his place by virtue of an appointment by the President, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States.

Id. at 307.[70]

It is clear that a private citizen is not subject to impeachment, except as to those offenses committed while holding federal public office.[71] This question was explored during the Belknap impeachment trial. Belknap resigned just prior to the adoption of impeachment articles by the House. The Senate, after having given exhaustive consideration to the arguments of the House managers and counsel for the respondent, concluded that the former Secretary of War was amenable to trial by impeachment for acts done in that office, despite his resignation from office before he was impeached. Belknap's demurrer to the replication of the House on the ground that the Senate lacked jurisdiction to go forward with the impeachment was therefore overruled.[72]

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[65] III HINDS' § 2318, at 678-80.

[66] *See,* III HINDS' § 1785.

[67] *See,* III HINDS' § 2515.

[68] *See,* III HINDS' §§ 2022, 2486, 2493.

[69] *See,* VI CANNON'S § 548. JEFFERSON'S MANUAL § 174 briefly discusses this question in light of the precedents.

[70] *See,* Library of Congress, Legislative Reference Service. "Impeachment," *reprinted in* LEGAL MATERIALS ON IMPEACHMENT, PREPARED BY THE SPECIAL SUBCOMMITTEE ON H.RES. 91-920 OF THE COMMITTEE ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES, 91st Cong., 2d Sess., pursuant to H.Res. 93, at 4 (Comm. Print, August 11, 1970).

[71] III HINDS' § 2007, at 310-28.

[72] III HINDS' § 2007, at 321. While this precedent clearly exists, it may be noted that Belknap was acquitted of the charges against him in the articles of impeachment. This acquittal seems to have reflected, in part, a residual level of (continued...)

What Kinds of Conduct May Give Rise to an Impeachment?

The second fundamental issue which each Congress contemplating impeachment of a federal official must confront is whether the conduct in question falls within the constitutional parameters of "treason, bribery, or other high crimes and misdemeanors." Treason is defined in the Constitution, Art. III, Sec. 3, cl. 1, and in statute, 18 U.S.C. § 2381, to mean levying war against the United States or adhering to their enemies, giving them aid and comfort. The Constitution requires that a conviction on a charge of treason be supported by the testimony of two witnesses to the same overt act or a confession in open court. The statutory language expressly applies only to those owing allegiance to the United States. Bribery is not defined in the Constitution, although it was an offense at common law, and the First Congress enacted a bribery statute, the Act of April 30, 1790, 1 Stat. 112, 117, which, with some amendment, is now codified at 18 U.S.C. § 201.[73] Thus treason and bribery may be fairly clear as to their meanings, but the remainder of the language has been the subject of considerable debate. The phrase "high crimes and misdemeanors" is not defined in the Constitution or in statute. It was used in many of the English impeachments, which were proceedings in which criminal sanctions could be imposed upon conviction. As Alex Simpson, Jr., amply demonstrated in his discussion of the Constitutional Convention's debate on this language and the discussion of it in the state conventions considering ratification of the Constitution, in "Federal Impeachments," 64 U. PA. L. REV. 651, 676-695 (1916), confusion as to its meaning appears to have existed even at the time of its drafting and ratification. No definitive list of types of conduct falling within the "high crimes and misdemeanors" language has been forthcoming as a result of this debate, but some measure of clarification has emerged.

Article 1, Section 3, Clause 7 appears to anticipate that some of the conduct within this ambit may also provide grounds for criminal prosecution. It indicates that the impeachment process does not foreclose judicial action. Its phrasing might be regarded as implying that the impeachment proceedings would precede the judicial process, but, as is evident from the impeachments of Judge Claiborne in 1986, and of Judges Hastings and Nixon in 1988 and 1989, at least as to federal judges and probably as to most civil officers subject to impeachment under the Constitution, the impeachment process may also follow the conclusion of the criminal proceedings. Whether impeachment and removal of a President must precede any criminal prosecution is as yet an unanswered question.

(...continued)

concern on the part of some of the Senators as to the wisdom of trying an impeachment of a person no longer in office. Two of the 37 voting "guilty" and 22 of the 25 voting "not guilty" stated that they believed the Senate lacked jurisdiction in the case. III HINDS' § 2467, at 945-46.

[73] This measure, as amended, was included in the 1878 codification and revision of the United States Statutes, Rev. Stat. § 5501 (2d ed. 1878). It was again amended (and seemingly also repealed, *see* Act of March 4, 1909, ch. 321, § 341, 35 Stat. 1153) in 1909, Act of March 4, 1909, ch. 321, § 117, 35 Stat. 1109-10 (1909); and in 1948, Act of June 25, 1948, ch. 645, § 207, 62 Stat 692-93 (1948), 18 U.S.C. §207 (1952 ed.) (The 1940-46 editions of the United States Code show then current versions of this measure at 18 U.S.C. § 238.). It was re-enacted as amended in 1962, Act of October 23, 1962, P.L. 87-849, § 201(e), 76 Stat. 1119 (1962), as part of a rewriting and consolidation of the bribery provisions previously codified at 18 U.S.C. §§ 201-213. The current language is included in 18 U.S.C. § 201, as amended by P.L. 91-405, Title II, § 204(d)(1), Act of September 22, 1970, 84 Stat. 853; P.L. 99-646, § 46(a)-(l), Act of November 10, 1986, 100 Stat. 3601-3604; and P.L. 103-322, Title XXXIII, §§ 330011(b), 330016(2)(D), September 13, 1994, 108 Stat. 2144, 2148.

The debate on the impeachable offenses during the Constitutional Convention in 1787 indicates that criminal conduct was at least part of what was included in the "treason, bribery, or other high crimes and misdemeanors" language.[74] However, the precedents in this country, as they have developed, reflect the fact that conduct which may not constitute a crime, but which may still be serious misbehavior bringing disrepute upon the public office involved, may provide a sufficient ground for impeachment. For example, Judge John Pickering was convicted on all four of the articles of impeachment brought against him. Among those charges were allegations of mishandling a case before him in contravention of federal laws and procedures: (1) by delivering a ship which was the subject of a condemnation proceeding for violation of customs laws to the claimant without requiring bond to be posted after the ship had been attached by the marshal; (2) by refusing to hear some of the testimony offered by the United States in that case; and (3) by refusing to grant the United States an appeal despite the fact that the United States was entitled to an appeal as a matter of right under federal law. However, the fourth article against him alleged that he appeared on the bench in an intemperate and intoxicated state.[75]

Judge Halsted Ritter was acquitted of six of the seven articles brought against him. He was convicted on the seventh, which summarized or listed the first six articles and charged that the "reasonable and probable consequences of the actions or conduct" involved therein were "to bring his court into scandal and disrepute, to the prejudice of said court and public confidence in the Federal judiciary, and to render him unfit to continue to serve as such judge." The factual allegations upon which this statement was based included assertions that Ritter, while a federal judge, accepted large fees and gratuities and engaged in income tax evasion. This article was challenged unsuccessfully on a point of order based upon the contention that article VII repeated and combined facts, circumstances and charges from the preceding six articles. The President Pro Tempore ruled that article VII involved a separate charge of "general misbehavior."[76]

It has been suggested that the impeachment provisions and the "good behaviour" language of the judicial tenure provision in Article III, Sec. 1, of the Constitution should be read in conjunction with one another.[77] Whether this would serve to differentiate impeachable offenses for judicial officers from those which would apply to civil officers in the executive branch is not altogether clear. During the impeachment investigation of Justice Douglas in the 91st Congress, Representative Paul McCloskey, Jr., reading the impeachment and good behavior provisions in tandem, contended that a federal judge could be impeached for either improper judicial conduct or non-judicial conduct amounting to a criminal offense.[78] Then Minority Leader Gerald Ford inserted in the *Congressional Record* a memorandum taking the position that impeachable misbehavior by a judge involved proven conduct, "either in the administration of justice or in his personal behavior," which casts doubt on his personal integrity and thereby on the integrity of the

[74] *See* the discussion of the debates on this subject in the minority views in connection with the report submitted by the House Judiciary Committee recommending President Nixon's impeachment, H.R. Rept. No. 1305, 93rd Cong., 2d Sess. 362-72 (1974), *printed in* 120 *Cong. Rec.* 29312-15 (1974). For a discussion of presidential impeachment grounds, see 3 DESCHLER'S § 3.8, at 434-45.

[75] Judge Pickering did not appear himself or by counsel. In the Senate trial, a written petition offered by Judge Pickering's son, through Robert G. Harper, indicated that the Judge had been under treatment for mental illness for over two years without success. III HINDS' §§ 2333-2335, at 697-704. If circumstances involving mental illness were to exist with respect to a current federal judge, disability retirement might be sought under 28 U.S.C. § 372.

[76] 3 DESCHLER'S ch. 14, § 13.6, at 581-82.

[77] *See*, 3 DESCHLER'S ch. 14, § 3.10, at 449-52.

[78] *Id.*

entire judiciary."[79] During the Douglas impeachment debate, Representative Frank Thompson, Jr., argued that historically federal judges had only been impeached for misconduct that was both criminal in nature and related to their judicial functions, and that such a construction of the constitutional authority was necessary to maintaining an independent judiciary.[80] In the FINAL REPORT BY THE SPECIAL SUBCOMMITTEE ON H.RES. 920 OF THE COMMITTEE ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES, 91st Cong., 2d Sess. (Comm. Print, September 17, 1970), as cited in 3 DESCHLER'S ch. 14, § 3.13, the Subcommittee suggested two "concepts" related to this question for the committee to consider. These concepts shared some common ground. As the Subcommittee observed:

> Both concepts would allow a judge to be impeached for acts which occur in the exercise of judicial office that (1) involved criminal conduct in violation of law, or (2) that involved serious dereliction from public duty, but not necessarily in violation of positive statutory law or forbidden by the common law. Sloth, drunkenness on the bench, or unwarranted and unreasonable impartiality [sic?] manifest for a prolonged period are examples of misconduct, not necessarily criminal in nature, that would support impeachment. When such misbehavior occurs in connection with the federal office, actual criminal conduct should not be a requisite to impeachment of a judge or any other federal official. While such conduct need not be criminal, it nonetheless must be sufficiently serious to be offenses against good morals and injurious to the social body.
>
> Both concepts would allow a judge to be impeached for conduct not connected with the duties and responsibilities of the judicial office which involve [sic] criminal acts in violation of law.[81]

Thus it would appear that this common ground represented those general principles which the Subcommittee deemed fundamental to conduct upon which impeachment of a federal judge could be based.

In connection with the impeachment of Judge Samuel B. Kent, the House Judiciary Committee, in H.Rept. 111-159, looked to the House Reports accompanying the impeachment resolutions relating to Judge Walter L. Nixon, Jr.,[82] and to Judge Alcee Hastings[83] for insights as to the meaning of the term "other high Crimes and Misdemeanors." In H.Rept. 101-36, the House Judiciary Committee observed:

> The House and Senate have both interpreted the phrase broadly, finding that impeachable offenses need not be limited to criminal conduct. Congress has repeatedly defined "other high Crimes and Misdemeanors" to be serious violations of the public trust, not necessarily indictable offenses under criminal laws.[84]

[79] 3 DESCHLER'S ch. 14, § 3.11, at 452-55.

[80] *See,* 3 DESCHLER'S ch. 14, § 3.12, at 455-57.

[81] 3 DESCHLER'S ch. 14 § 3.13, at 463-64; 3 DESCHLER'S ch. 14 § 5.14, at 2035-36.

[82] H.Rept. 101-36, at 5 (1989) (Impeachment of Walter L. Nixon, Jr., Report of the Committee on the Judiciary to Accompany H.Res. 87).

[83] H.Rept. 100-810, at 6 (1988) (Impeachment of Alcee L. Hastings, Report of the Committee on the Judiciary to Accompany H.Res. 499).

[84] H.Rept. 101-36 at 5, *quoted in* H.Rept. 111-159, at 5.

H.Rept. 101-36 noted that, in some instances, the conduct involved may "warrant both punishment under the criminal law and impeachment."[85] In light of its review of the historical precedents, H.Rept. 101-36 perceived the question of what constituted an impeachable offense in the context of federal judges to have:

> evolved to the position where the focus is now on public confidence in the integrity and impartiality of the judiciary. Where a judge's conduct calls into question his or her integrity or impartiality, Congress must consider whether impeachment and removal of the judge from office is necessary to protect the integrity of the judicial branch and uphold the public trust.[86]

H.Rept. 100-810 stated that the constitutional "high Crimes and Misdemeanors" standard "refers to misconduct that damages the state and the operations of governmental institutions, and is not limited to criminal conduct."[87] In H.Rept. 100-810, the committee also drew attention to the non-criminal nature of impeachment, designed to remove the federal officer involved in such misconduct from his or her office and to protect "our constitutional form of government from the depredations of those in high office who abuse or violate the public trust."[88]

There is no constitutional parallel to the judicial "good behaviour" language applicable to executive officials. In its impeachment resolution with respect to President William Jefferson Clinton in 1998, H.Res. 611 (105th Cong.), the House alleged that, by engaging in the conduct set forth in two articles of impeachment, he had "undermined the integrity of his office, brought disrepute on the Presidency, betrayed his trust as President, and acted in a manner subversive of the rule of law and justice, to the manifest injury of the people of the United States." In particular, the articles of impeachment stated that, "[i]n his conduct while President of the United States, William Jefferson Clinton, in violation of his constitutional oath faithfully to execute the office of President of the United States and, to the best of his ability, preserve, protect, and defend the Constitution of the United States, and in violation of his constitutional duty to take care that the laws be faithfully executed," had "willfully corrupted and manipulated the judicial process of the United States for his personal gain and exoneration, impeding the administration of justice" by making false statements to a federal grand jury regarding an extramarital affair, and had "prevented, obstructed, and impeded the administration of justice, and ha[d] to that end engaged personally, and through his subordinates and agents, in a course of conduct or scheme designed to delay, impede, cover up, and conceal the existence of evidence and testimony related to a Federal civil rights action brought against him in a duly instituted judicial proceeding." The House Judiciary Committee, in the minority views included in H.Rept. 105-830, the report of the House Judiciary Committee accompanying H.Res. 611, expressed the view "that the allegations that the President violated criminal laws in attempting to conceal that relationship—even if proven true—[did not] amount to the abuse of official power which is an historically rooted prerequisite for impeaching a President."[89] In addition, the minority views stated a belief that the majority had not "come anywhere close to establishing the impeachable misconduct alleged by the required clear and convincing evidence."[90]

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[85] *Id.*, *quoted in* H.Rept. 111-159, at 5-6.

[86] *Id.*, at 12, *quoted in* H.Rept. 111-159, at 6.

[87] H.R. Rept. No. 100-810 at 6, quoted in H.Rept. 111-159 at 6.

[88] *Id.*, at 6-7, *quoted* in H.Rept. 111-159 at 6.

[89] H.Rept. 105-830, at 200 (1998).

[90] *Id.*

The House Judiciary Committee, in recommending articles of impeachment against President Richard Nixon in 1974, appears to have premised those articles on the theory that President Nixon abused the powers of his office, causing "injury to the confidence of the nation and great prejudice to the cause of law and justice," and resulting in subversion of constitutional government; that he failed to carry out his constitutional obligation to faithfully execute the laws; and that he failed to comply with congressional subpoenas needed to provide relevant evidence for the impeachment investigation.[91] The minority of the House Committee on the Judiciary in the report recommending that President Nixon be impeached took the view that errors in the administration of his office were not sufficient grounds for impeachment of the President or any other civil officer of the United States.[92] The minority views seem to suggest that, under their interpretation of "high crimes and misdemeanors," crimes or actions with criminal intent must be the basis of an impeachment.[93]

The charges against President Andrew Johnson involved allegations of actions in violation of the Tenure of Office Act, Act of March 2, 1867, ch. 154, § 6, 14 Stat. 430, including removing Secretary of War Stanton and replacing him with Secretary of War Thomas and other related actions. Two of the articles brought against the President asserted that he sought to set aside the rightful authority of Congress and to bring it into reproach, disrepute and contempt by "harangues" criticizing the Congress and questioning its legislative authority.[94] He was acquitted on those articles upon which votes were taken. The only other executive branch officer to go to trial on articles of impeachment was Secretary of War Belknap. The articles alleged that he, in an exercise of his authority as Secretary of War, appointed John Evans to maintain a trading post at Fort Sill, and allowed Evans to continue in that position, as part of an arrangement which provided Belknap personal gain. The arrangement allegedly provided that Evans would pay $12,000 annually from the profits of the trading post to a third party who would, in turn, pay Belknap $6,000 annually. Belknap resigned before the Senate trial on his impeachment and was not convicted on any of these articles.

The House has impeached and the Senate has tried a federal judge based upon articles of impeachment alleging misconduct committed in his then current federal offices and misconduct committed while he was serving in his previous federal office. In 1912, in response to H.Res. 511 (62nd Congress),[95] the President transmitted to the House Judiciary Committee information related to an investigation by the U.S. Department of Justice of charges of improper conduct by Judge

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[91] *See,* 3 DESCHLER'S ch. 14, § 3.7, at 429-34.

[92] H.Rept. 93-1305, 93rd Cong., 2d Sess. 362-72, *printed at* 120 *Cong. Rec.* 29312-15 (1974), *as reprinted in part in* 3 DESCHLER'S ch. 14, § 3.8, at 434, 435.

[93] 3 DESCHLER'S ch. 14, § 3.8 at 438-45.

[94] *See, Impeachment of President Andrew Johnson*, in H. COMM. ON THE JUDICIARY, 93RD CONG., 1ST SESS., IMPEACHMENT, SELECTED MATERIALS 154-61 (Comm. Print October 1973), and in H. COMM. ON THE JUDICIARY, 105TH CONG., 2D SESS., IMPEACHMENT, SELECTED MATERIALS 1290-97 (Comm. Print November 1998).

[95] 48 *Cong. Rec*. 5242 (April 23, 1912). The resolution, introduced by Representative George W. Norris of Nebraska, provided:

> *Resolved*, That the president of the United States be, and he is hereby, requested, if not incompatible with the public interest, to transmit to the House of Representatives a copy of any charges filed against Robert W. Archbald, associate judge of the United States Commerce Court, together with the report of any special attorney or agent appointed by the Department of Justice to investigate such charges, and a copy of any and all affidavits, photographs, and evidence filed in the Department of Justice in relation to said charges, together with a statement of the action of the Department of Justice, if any, taken upon said charges and report.

Robert W. Archbald, which had been brought to the President's attention by the Commissioner of the Interstate Commerce Commission.[96] A resolution impeaching Judge Archbald and setting forth 13 articles of impeachment was reported out of the House Judiciary Committee, and agreed to by the House.[97] At the time that Judge Robert W. Archbald was impeached by the House and tried by the Senate in the 62nd Congress, he was a U.S. Circuit Judge for the Third Circuit and was designated a Judge of the U.S. Commerce Court. The articles of impeachment brought against him alleged misconduct in those positions as well as in his previous position as a U.S. District Court Judge of the Middle District of Pennsylvania.[98] Judge Archbald was convicted on four articles alleging misconduct in his then current positions as a Circuit Judge and Commerce Court Judge, and on a fifth article that alleged misuse of his office both in his then current positions and in his previous position as a U.S. District Judge.[99]

Some other allegations of misconduct occurring in both prior and current federal offices have been investigated by the House with an eye toward impeachment. For example, on March 1, 1879, after investigating the administration of the office of consulate-general in Shanghai, China, during the terms of George F. Seward, former consul-general and then current envoy extraordinary and minister plenipotentiary of the United States of America to China, and two others, a Member presented to the House the report of the majority of the Committee on Expenditures in the State Department, consisting of 17 articles of impeachment alleging misconduct by Seward both while consul-general in Shanghai and while minister to China. In recommending a resolution impeaching Seward for high crimes and misdemeanors while in office, the committee referred to him in both his former and then current official capacities.[100] The minority of the committee recommended that the report, together with the evidence in the case, be referred to the House Judiciary Committee. The House, on March 3, 1879, the last day of the 45th Congress, voted to consider the report, but dilatory proceedings thereafter prevented any action on it.[101]

In connection with the same investigation, on March 22, 1878, the House Committee on Expenditures in the State Department reported a recommendation that Oliver B. Bradford, "late vice-consul-general at Shanghai, China," and "late clerk of the consular court of the United States at Shanghai," and, at the time of the report, both postal agent of the United States in Shanghai and consular clerk of the United States in Shanghai, be impeached for high crimes and misdemeanors while in office. The committee also reported 10 articles of impeachment. While the committee Members were in agreement that the evidence sustained the charges, some Members of the committee questioned whether Bradford was an impeachable officer. A motion to refer the entire matter to the House Judiciary Committee was agreed to without division.[102]

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[96] VI CANNON'S, §§ 498, 499, at 684-686.

[97] *Id.* at § 500, at 686-87.

[98] H. Res. 622 (62nd Congress), printed in "Articles of Impeachment Presented Against Robert W. Archbald, Additional Circuit Judge of the United States from the Third Judicial District," S. Doc. 874, 62nd Cong., 2d Sess. (July 15, 1912).

[99] Thirteen articles of impeachment were brought against Judge Archbald. He was convicted on articles I, III, IV, V, and XIII, acquitted on the remaining articles, removed from office, and disqualified from holding further offices of honor, trust, or profit under the United States. VI CANNON'S , §§ 499, 512, at 686, 705-708.

[100] III HINDS' § 2514, at 1025.

[101] *Id.* at 1023-25.

[102] III HINDS' § 2516, at 1025-26.

Judge G. Thomas Porteous was the first person to have been impeached by the House and convicted by the Senate based, in part, upon conduct occurring before he began his tenure in his federal office. Article I and article II each alleged misconduct beginning while he was a state court judge as well as misconduct while he was a federal judge. Article IV alleged false statements in connection with his nomination and confirmation to the U.S. District Court for the Eastern District of Louisiana. The allegations in article IV involved entirely pre-federal conduct, albeit conduct directly related to his appointment to the federal bench. Article III alleged personal misconduct in connection with his Chapter 13 bankruptcy case. On December 8, 2010, he was convicted on all four articles, removed from office, and disqualified from holding future federal offices.[103]

On the other hand, it does not appear that any President, Vice President, or other civil officer of the United States has been impeached by the House *solely* on the basis of conduct occurring before he began his tenure in the office held at the time of the impeachment investigation, although the House has, on occasion, investigated such allegations. The House, in 1826, responded to a letter from Vice President John C. Calhoun requesting an impeachment investigation into whether his prior conduct as Secretary of War constituted an impeachable offense by referring the matter to a select committee. After an extensive investigation, the select committee reported back recommending that the House take no action. The House laid the measure on the table.[104]

Pursuant to a resolution agreed to on December 2, 1872, the Speaker *pro tempore* of the House appointed a special committee "to investigate and ascertain whether any member of this House was bribed by OAKES AMES[105] or any other person in any matter touching his legislative duty."[106] On February 20, 1873, the House agreed to a resolution directing that the testimony taken by the special committee be referred to the House Judiciary Committee "to inquire whether anything in such testimony warrants impeachment of any officer of the United States not a Member of this House, or makes it proper that further investigation be ordered in this case."[107] In effect, this appears to have limited the investigation to charges against then-Vice President Schuyler Colfax, regarding bribery allegations relating to Colfax' tenure as Speaker of the House of Representatives, prior to his becoming Vice President. While as Vice President Colfax was subject to impeachment, as a Member of the House he was not an impeachable officer. After a review of past federal, state, and British impeachment precedents, the House Judiciary Committee stated that, in light of the pertinent U.S. constitutional language and the remedial nature of impeachment, impeachment "should only be applied to high crimes and misdemeanors committed while in office, and which alone affect the officer in discharge of his duties as such, whatever

[103] For more detailed discussion of the impeachment of Judge Porteous, see the section of this report entitled "Summary of Impeachment Proceedings in the 111th Congress," *supra*, at pages 1-4, footnotes 1-20 and accompanying text.

[104] III HINDS', § 1736, at 97-99.

[105] Allegations had been made during the preceding presidential campaign that suggested that Representative Oakes Ames of Massachusetts had bribed several Members of the House to perform certain legislative acts for the benefit of the Union Pacific Railroad Company by giving them presents of stock in a corporation known as the "Credit Mobilier of America" or by presents derived therefrom. 46 *Cong. Globe*, 42nd Cong., 3d Sess. 11 (December 2, 1872).

[106] *Id.* at 11-12 (December 2, 1872).

[107] 46 *Cong. Globe*, 42nd Cong., 3d Sess. 1545 (February 20, 1873). 3 DESCHLER'S ch.14, § 5.14, at 2036, indicates that the investigation was at Vice President Colfax's request. There appears to be nothing in the *Congressional Globe* on February 20, 1873, that addresses or reflects such a request.

may have been their effect upon him as a man, for impeachment touches the office only and qualifications for the office, and not the man himself."[108] The committee concluded:

> For the reasons so hastily stated, and many more which might be adduced, your committee conclude that both the impeaching power bestowed upon the two Houses by the Constitution and the power of expulsion are remedial only and not punitive so as to extend to all crimes at all times, and are not to be used in any constitutional sense or right for the purpose of punishing any man for a crime committed before he becomes a member of the House or in case of a civil officer as just cause of impeachment; ....
>
> We have therefore come to the opinion that so far as receiving and holding an interest in the Credit Mobilier stock is concerned there is nothing in the testimony submitted to us which would warrant impeachment in the case of the Vice President.[109]

The views of the minority of the committee were also printed in the *Congressional Globe.* Representative Clarkson Potter dissented from much of the committee's report, but was "constrained to consent to the recommendation that at this stage of the session they be discharged from the subject."[110] In explaining his views, he noted that Vice President Colfax would be leaving office in five days and would therefore not have an opportunity for an impeachment trial; remarked upon the absence of precedents; and discussed the Constitutional Convention, and contemporary writings. He concluded that he did not "feel so clearly justified in holding, either upon principle, precedent, or authority, that Congress has the power to impeach a civil officer such as the Vice President for crime committed before induction into such office as to make [him] willing to recommend an impeachment for such an offense at a time when the impeachment cannot possibly be tried."[111] Representative M. Goodrich dissented from the report and, in particular, from "the principle [the committee] asserts that an officer of the United States or a member of this House is not liable either to impeachment or expulsion for any offense whatever, committed prior to the commencement of his term, during which the question of his impeachment or expulsion is raised." While he viewed such a doctrine as "sufficiently protective of the officer," he questioned whether it was sufficiently protective "with reference to the more important interests of his constituency that may be involved."[112]

The committee's report was made in the House on February 24, 1873, briefly debated, and then postponed to February 26, 1873.[113] However, it does not appear to have been taken up again.[114]

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[108] 46 *Cong. Globe*, 42nd Cong., 3d Sess. 1652 (February 24, 1873). The report of the House Judiciary Committee in its entirety, along with the views of the minority, is printed at 46 *Cong. Globe*, 42nd Cong., 3d Sess. 1651-55 (February 24, 1873). *See also*, III HINDS' § 2510, at 1017-19.

[109] 46 *Cong. Globe*, 42nd Cong., 3d Sess. 1653 (February 24, 1873).

[110] *Id.*

[111] *Id.* at 1655.

[112] *Id.*

[113] *Id.* at 1655-57.

[114] III HINDS' § 2510, at 1019.

In contrast, approximately 100 years later, then-Vice President Spiro Agnew wrote a letter to the House seeking an impeachment investigation of allegations against him concerning his conduct while governor of Maryland. The Speaker declined to take up the matter because it was pending before the courts. The House took no substantive action on seven related resolutions, seemingly because of concerns regarding the matter's pendency in the courts and regarding the fact that the conduct involved occurred before Agnew began his tenure as Vice President.[115]

This review of some of the precedents on the question of what constitutes an impeachable offense suggests that the answer to this question is less than completely clear. Serious criminal conduct appears to be a sufficient ground, whether the person involved is a judge or a member of the executive branch. Where the person to be impeached is the President or an executive officer, conduct having criminal intent, serious abuses of the power of the office involved, failure to carry out the duties of that office, and, possibly, interference with the Congress in an impeachment investigation of the President or other executive official may be enough to support an article of impeachment. As to federal judges, the impeachment language might be read in light of the constitutional language providing that they serve during good behavior. With this in mind, a judge may be vulnerable to impeachment, not only for criminal conduct, but also for improper judicial conduct involving a serious dereliction of duty; or serious misconduct, including personal misconduct,[116] placing the judge, the court or the judiciary in disrepute; or casting doubt upon his integrity and the integrity of the judiciary.[117] In a single impeachment, articles of impeachment may allege misconduct in both current and past federal offices where all such offices are subject to the impeachment process. An impeachment article may also address misconduct occurring before the commencement of an individual's tenure in a federal office where there is a connection between that prior misconduct and conduct in the federal office. False statements in connection with a nomination and confirmation to a federal office may also be the basis of an article of impeachment. However, historically views have differed as to whether an impeachment might be based solely upon conduct committed prior to the commencement of a federal officer's tenure in his current federal position. It is unclear whether a federal officer would be subject to impeachment for conduct committed in a prior federal office, where both current and past offices were within the reach of the impeachment power. Nor is it clear whether an impeachment would lie against a federal officer currently holding a position covered by the constitutional impeachment authority, where the alleged misconduct at issue occurred while he held a position in the U.S. government to which the impeachment power did not apply or while he held a state office. Past precedent also suggests that, if state court proceedings are pending regarding alleged misconduct in a previously held state office, the House may decline to pursue an impeachment investigation of a person currently holding a federal office within the scope of the impeachment power based upon such allegations.

[115] *See*, footnote 39, *supra*.

[116] *See, e.g.*, impeachments of Judge Harry E. Claiborne for tax evasion and Judge G. Thomas Porteous, in article III, for misconduct related to his Chapter 13 bankruptcy.

[117] For further information regarding impeachment grounds, see CRS Report 98-882, *Impeachment Grounds: A Collection of Selected Materials*, by Charles Doyle.

Conclusions and Other Observations

The American impeachment process, a constitutionally based remedy, provides a legislative mechanism for investigating and trying allegations of some forms of serious misconduct on the part of the President, Vice President, and "civil Officers of the United States." This mechanism has been used in cases involving judges, Presidents, and certain senior members of the executive branch. It has been found not to apply to Senators, and, although a parallel case does not exist as to Members of the House of Representatives, it seems likely that, on similar lines of reasoning, it would also be found inapplicable to them. The "civil Officer" language is not defined in the Constitution, and its outer limits are still somewhat unclear. It has been used to reach Cabinet level officials. It may be argued that it should be regarded as reaching anyone whose appointment to an office of public trust must be in compliance with the Appointments Clause of the Constitution. Private citizens are not vulnerable to impeachment.

The constitutional language which states that impeachment may lie for "treason, bribery, or other high crimes or misdemeanors" also lacks definition in the document itself, although treason is defined elsewhere in the Constitution. Here, too, the precedents provide some guidance as to what has been viewed as an impeachable offense, as do the debates at the Constitutional Convention of 1787, but the outside boundaries of the language have not been fully explored. It seems clear that a criminal offense may give rise to an impeachment. Yet in some of the impeachments which have gone to trial and conviction, some of the articles have involved conduct which did not constitute a crime, but which did involve serious misconduct or gross improprieties while in office or abuse of the powers of the office. Such serious misconduct may include personal conduct such as tax evasion[118] or misconduct in connection with a personal bankruptcy.[119] Some of the literature seems to suggest that the standard for impeachable offenses may be somewhat different for Presidents and members of the executive branch than for judges.

The impeachment process itself appears to be placed completely in the hands of the legislative branch,[120] although the subject of an inquiry may occasionally be brought to the attention of the House through communications from one of the other two branches or from one of the state legislatures. The House has the responsibility to make the initial investigation and to determine whether or not to impeach. If the Members of the House decide that impeachment is appropriate, they vote to impeach and vote articles of impeachment specifying the particular grounds upon which the impeachment is based. These are then presented to the Senate for trial.

In the Senate trial, the House of Representatives is represented by Managers, who may be assisted by counsel. The individual impeached also is entitled to assistance of counsel. After the Senate has considered the evidence presented, it then must determine whether or not to convict upon

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[118] *See, e.g.*, the impeachment trial of Judge Harry E. Claiborne.

[119] *See* the impeachment of Judge G. Thomas Porteous.

[120] *See*, *Nixon v. United States*, 506 U.S. 224 (1993), *affirming*, 938 F.2d 239 (D.C. Cir. 1991), *affirming* 744 F. Supp. 9 (D.D.C. 1990) (finding that the issue of the constitutional sufficiency of the Senate's Rule XI procedure was nonjusticiable by application of the political question doctrine). *But see, Hastings v. United States*, 802 F. Supp. 490 (D.D.C. 1992) (finding that the court had jurisdiction to evaluate the constitutional sufficiency of the Senate impeachment trial procedures and concluding that the Rule XI committee procedure suffered from constitutional frailties), *vacated and remanded*, 988 F.2d 1280 (Table Case), 1993 U.S. App. 11592 (unpublished per curiam) (D.C. Cir. 1993), *dismissed*, 837 F. Supp. 3 (D.D.C. 1993). See discussion at pp. 9-12, *supra*, and fns. 22, 23, and 33 for further information regarding Rule XI and these court decisions.

each of the articles separately. A conviction on any article must be supported by a vote of two-thirds of the Senators present. A conviction on any one of the articles constitutes a conviction in the impeachment trial; the individual need not be convicted on all of the articles brought against him. If the Senate does vote to convict on an article, then it must determine what judgment is to flow from that decision. The Senate has two options: either to remove from office alone, or to remove from office and to prohibit the individual from holding other offices of public trust under the United States in the future. Recent precedents suggest that removal may flow automatically from conviction, but, if prohibition from holding further offices of public trust is to be applied, it must be voted upon specifically. The two issues are divisible. With regard to the determination as to the appropriate judgment, a simple majority vote is sufficient to sustain it. A two-thirds majority is not required.

The impeachment process is a complex and cumbersome mechanism. It places in the hands of the two legislative bodies the determination as to the fitness to continue in office of some of the officers of the judicial and executive branches. As such it can act as a check upon abuses of power or instances of serious misconduct by those judicial and executive officers vulnerable to impeachment. It also places significant demands upon legislative time and resources. It is possible that this represents an effort by the constitutional framers to balance the need to provide a means of remedying such misconduct against the need to minimize the chance that this legislative power to intrude into the business or personnel of the other co-equal branches could itself be over-used or abused. Its constitutional framework is skeletal, providing minimal guidance as to the nature of the proceedings. This void is filled to a great extent by House and Senate rules, procedures, and precedents. Yet, some questions remain, a few of which have been addressed in this report.

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